Petition

NO. 81 5871

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KENNETH FORD — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

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COUNSEL FOR PETITIONER

December 11, 1981

QUESTIONS PRESENTED

I.

WHETHER PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN, OVER REPEATED DEFENSE OBJECTIONS AND MISTRIAL MOTIONS, THE PROSECUTOR WAS PERMITTED TO PLACE BEFORE THE JURY, EITHER BY IMPROPER DISPLAY OR AS ADMITTED EVIDENCE, PHYSICAL EVIDENCE -- A HANDGUN AND A PAIR OF SHOES, WHICH HAD BOTH BEEN SUPPRESSED AND EXCLUDED FROM EVIDENCE, ON FOURTH AMENDMENT GROUNDS, BY A PRETRIAL ORDER OF THE TRIAL JUDGE

II.

WHETHER THE EXCLUSIONARY RULE REQUIRES SUPPRESSION OF EVIDENCE SEIZED INCIDENT TO A WARRANTLESS ARREST OF PETITIONER IN HIS MOTEL ROOM WHEN THAT ARREST OCCURRED PRIOR TO THE DECISION IN PAYTON V. NEW YORK, 445 U.S. 573 (1980).

III.

WHETHER PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT OF DUE PROCESS WAS DENIED WHEN THE TRIAL COURT ALLOWED THE PROSECUTION, OVER DEFENSE OBJECTION, TO REVEAL TO THE JURY THE NATURE OF PETITONER'S ALLEGED PRIOR CONVICTION - AGGRAVATED ASSAULT AND BATTERY - WHEN PETITIONER WAS BEING TRIED FOR, INTER ALIA, FIRST DEGREE ASSAULT.

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

The petitioner, Kenneth Ford, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered on July 7, 1981.

OPINION BELOW

The opinion of the Supreme Court of Kentucky affirming petitioner's judgment of conviction was filed on July 7, 1981 and is unreported (Appendix, hereinafter designated App., pp. 1-6). The order denying petitioner's timely petition for rehearing was entered on October 13, 1981 (App., p. 7).

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on July 7, 1981. Petitioner's petition for rehearing was timely docketed on September 16, 1981 by the order of the Supreme Court of Kentucky (App., p. 8). The petition for rehearing was denied on October 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth and Fourteenth Amendments to the Federal Constitution.

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourteenth Amendment to the United States Constitution, in pertinent part:

> ...nor shall any State deprive any person of liberty ... without due process of law...

STATEMENT OF THE CASE

On January 15, 1980, the petitioner, Kenneth Ford, was indicted in the Daviess Circuit Court for one count of first degree robbery, one count of first degree assault, one count of first degree burglary, and one count of possession of a handgun by a convicted felon -- violations of KRS 515.020, KRS 508.010, KRS 511.020, and KRS 527.040, respectively (Transcript of Record, hereinafter designated T.R., p. 1).

According to count one of the indictment, petitioner, on or about November 3, 1979, "committed the offense of robbery in the first degree by using physical force upon and causing physical injury to Bernard Ward while in the course of committing a theft at the residence of Bernard Ward, 2205 Berkshire, Owensboro, Kentucky" (T.R., p. 1).

Count two of the indictment alleged that petitioner, on or about November 3, 1979, "committed the offense of assault in the first degree by beating Bernard Ward" (T.R., p. 1).

The third count of the indictment charged that petitioner, on or about November 3, 1979, "committed the offense of burglary in the first degree by unlawfully entering

the dwelling house of Bernard Ward with the intent to commit a crime" (T.R., p. 1).

The fourth and final count of the indictment alleged that petitioner, on or about November 3, 1979, "committed the offense of possession of a handgun after having been previously convicted of a felony" (T.R., p. 1).

At a jury trial held on May 12 and 13, 1980, petitioner was acquitted of the offense of first degree robbery, but, despite his plea of not guilty, convicted of the three remaining charges - first degree assault, first degree burglary and possession of a handgun by a convicted felon (T.R., pp. 47, 48-49; Transcript of Evidence, hereinafter designated T.E., p. 220). The jury fixed petitioner's sentence on the assault offense at imprisonment for seventeen years, on the burglary offense at ten years, and on the possession of a handgun offense at five years (T.R., pp. 47, 49; T.E., p. 220).

Trial defense counsel on May 16, 1980 filed a timely motion for a new trial, which was overruled that same day (T.R., p. 50; Transcript of Sentencing Hearing, hereinafter designated S.H., p. 2).

At the inception of the sentencing hearing held on May 16, 1980 the trial judge noted that appellant's written "motion for concurrent sentencing" would "be sustained in part" and subsequently announced that he would "run the 17 years [first degree assault] and the 5 years [possession of a handgun] consecutive[ly] with the 10 years [first degree burglary] to be run concurrently" for an aggregate sentence of twenty-two years of confinement (S.H., p. 6; T.R., p. 51).

Judgment was entered on May 16, 1980 (T.R., p. 56). Petitioner's notice of appeal was filed that same day (T.R., p. 60).

Petitioner on April 17, 1980 filed a pretrial motion "to suppress all the evidence seized from his motel residence on the grounds that the warrantless search was in violation of [petitioner's] Fourth Amendment Constitutional rights" (T.R., p. 33). On April 25, 1980 an evidentiary hearing was held on the defense motion to suppress (Transcript of Suppression Hearing, hereinafter designated T.S.H., p. 1). In an order entered on April 29, 1980, the trial judge granted the defense motion to suppress and ordered "any evidence received from the motel room ... suppressed" (T.R., p. 35).

A .32 caliber H & R pistol revolver and a pair of shoes were seized from that motel room and were the object of the suppression order (T.S.H., pp. 15-16, 18, 27; T.R., p. 6; T.E., pp. 7-9, 56-57, 90-91).

On May 12, 1980, prior to the selection of the jury, trial defense counsel made several motions, including a multi-part motion in liminie (T.E., pp. 2-8). In his motion in liminie, trial defense counsel informed the court that he "want[ed] to limit the evidence which refers to any robbery or to any possession of a handgun by a convicted felon based on the suppression hearing" (T.E., p. 7). Defense counsel emphasized that the court was "faced with a situation in this case where a crucial piece of evidence has been suppressed, the handgun" (T.E., p. 7). Pointing to the evidentiary limitations placed on the Commonwealth by the suppression order, defense counsel noted that the prosecutor "wishes to proceed on that charge [possession of a handgun by a convicted felon] where he knows in his case in chief that he cannot introduce this piece of evidence [the handgun]" (T.E., p. 7).

In the course of this motion, trial defense counsel also noted that the prosecution, in an effort to prove the elements of the offense of possession of a handgun by a convicted felon, would attempt to introduce proof that

petitioner had been previously convicted of the prior felony of aggravated assault and battery (T.E., p. 8). Defense counsel objected to the prosecution informing the jury of the nature of the prior felony conviction when petitioner was also standing trial for, inter alia, first degree assault (T.E., p. 8).

The trial court eventually overruled all of the defense's motions in liminie (T.E., p. 12).

During his opening statement, the prosecutor referred to the suppressed gun, indicated the Evidence Collection Department had the weapon, and that it would be identified by the alleged assault victim as the gun which had been in his possession at the time of the incident (T.E., p. 23). When defense counsel objected and moved for a mistrial, the trial judge sustained the objection, but overruled the mistrial motion (T.E., p. 23).

Defense counsel, in his opening statement given before the presentation of the Commonwealth's case, stated that the "evidence will show that when the police came to arrest" petitioner, "he had the gun and will readily admit he took the gun away from Bernard Ward" (T.E., p. 26).

The prosecution's evidence established that Bernard Ward and his wife Alice had been having marital problems over the years and that in early 1979 she had filed for divorce (T.E., pp. 29-32). Prior to October 22, 1979, Bernard Ward and his wife were separated (T.E., p. 32). During that time petitioner and Alice Ward were lovers (T.E., p. 64). On October 22, 1979, Mr. Ward and his wife attempted a reconciliation (T.E., pp. 30-32). However, by early November, 1979, the reconciliation was in shambles and Alice Ward had begun spending the nights with petitioner at his room at the Days Inn Motel (T.E., p. 64).

Mr. Ward testified that on October 22, 1979 at the office of his wife's attorney petitioner accosted him with a derogatory epithet (T.E., pp. 41-42). As petitioner "walked back toward" Ward, his wife stepped between the two men and

Ward took his unopened knife out of his pocket (T.E., p. 42). Later that day Ward purchased "a .32 caliber H & R pistol revolver" (T.E., p. 43).

Mr. Ward testified that some twelve days before the night in question, he had taken a warrant out against petitioner for terroristic threatening and had him placed in the county jail for ten days (T.E., pp. 34-36, 67)

On the morning of November 2, 1979, by his own testimony, Bernard Ward called petitioner at the Blue Bird Inn because Alice had "not come home that night" and he was "trying to find [his] wife" (T.E., pp. 37-38). After talking to his wife who was at the inn with petitioner, Mr. Ward and petitioner had a brief exchange in which petitioner allegedly threatened to break every bone in Ward's body (T.E., pp. 37-38).

Bernard Ward also related that at approximately one o'clock in the afternoon that same day petitioner telephoned him and threatened him (T.E., pp. 38-39). Ward also asserted that later that night several other threatening phone calls were made to him by petitioner (T.E., pp. 39-40). However, Ward claimed that at no time during these calls did he ever threaten petitioner (T.E., p. 39).

Bernard Ward testified for the prosecution that petitioner at approximately midnight on November 3, 1979 entered his residence, struck him in the face, demanded his money, took the money from his billfold, demanded his pistol, and struck him with a table leg, rendering him unconscious (T.E., pp. 46-48, 52, 68, 69, 77). The next thing Bernard Ward remembered was being "on the outside" of the house, "trying to get in [his] car," and "trying to holler for ... the boy that lived across the street" (T.E., pp. 48, 78).

During the prosecutor's direct examination of Bernard Ward, he was allowed, over defense objection, to show Ward the handgun which had been suppressed and have Ward identify the gun as the one in his possession at the

time of the alleged assault (T.E., pp. 57-58). The gun was admitted, over defense objection, as Commonwealth Exhibit 2 (T.E., p. 58).

Doctor Clifton E. Lowry, the medical doctor who had treated Mr. Ward for the injuries he received on November 3, 1979, testified concerning the nature and extent of those injuries (T.E., pp. 79-88). During direct examination of this witness, the prosecutor, over defense objection, was permitted to elicit as medical case history that Ward had told the doctor that he had been struck during the incident in question "with a table leg" (T.E., pp. 85-86).

Charles Porter and John Kazlauskas, both City of Owensboro police officers, testified as to their investigation of the incident at bar (T.E., pp. 90-108).

During his questioning of Officer Porter, the prosecutor displayed in the presence of the jury a pair of shoes which had been suppressed by the pretrial order (T.E., pp. 90-91). When the prosecutor began to question the witness about the shoes, defense counsel objected. The prosecutor then apologized, the judge sustained the objection, and no further reference was made to the shoes (T.E., pp. 90-91).

When the prosecutor announced his intention "to introduce into evidence the certified copy of the judgment" of appellant's alleged prior felony conviction, defense counsel objected on various grounds, but was subsequently overruled (T.E., p. 117). The document was "admitted as Commonwealth Exhibit 4" (T.E., p. 117).

The final prosecution witnesses, David Wilcox and Sherry Ralph, two neighbors of Mr. Ward, testified that they discovered Mr. Ward on the Wilcox front door step in the early hours of November 3, 1979 in a bloody and injured state (T.E., pp. 109-116).

At the conclusion of the prosecution's case-in-chief, trial defense counsel moved for a mistrial "on the

grounds that shoes were brought out contrary to [c]ourt order" of suppression, also "the gun was brought out contrary to [c]ourt order" (T.E., p. 122). On the basis that "the weapon should have never been exposed to a jury when it had been suppressed," trial defense counsel moved for a mistrial (T.E., p. 122). Immediately trial defense counsel moved for a directed verdict on all four charges (T.E., pp. 122-123). All of these motions were overruled (T.E., p. 126).

Alice Ward, Bernard Ward's estranged wife, testified for the defense that on various occasions, her husband had "pulled a gun out of his pocket" and threatened to "blow her head off" (T.E., pp. 127-128, 132). She emphasized that Bernard Ward carries a gun with him "[a]ll the time" (T.E., pp. 129-130). She explained that petitioner had previous to the alleged offenses expressed concern that since Ward had a weapon he might hurt Alice or her daughter, Debbie (T.E., p. 133).

Petitioner recalled that he had known Bernard Ward for "[a]pproximately a year" and during that time he had "many confrontations with Mr. Ward" mainly "over the phone" (T.E., p. 147). In most of these confrontations, according to petitioner, Bernard Ward was "going to kill" him or "shoot" him (T.E., p. 147).

Petitioner testified that on the evening of November 2, 1979, Bernard Ward, in the course of several telephone calls, threatened to kill both Alice Ward and petitioner (T.E., pp. 149-150). Although he "had been drinking quite a bit" and was "getting drunk," petitioner could tell that Alice Ward was becoming "nervous and upset" by her husband's phone calls (T.E., p. 150). Petitioner then called Bernard Ward back and "told him to leave [Alice and appellant] alone" (T.E., p. 150). In response, Bernard Ward threatened "to shoot" petitioner and "to kill" Alice Ward (T.E., p. 150).

Petitioner decided he had to go to the Ward residence and "get that gun" because "Alice and [her daughter] Debbie had to go back to the house that night" (T.E., p. 152). When petitioner arrived at the Ward residence, he went to the "front door," "opened the storm door," and "knocked on the inside door" (T.E., pp. 152-153). After petitioner had knocked "loudly ... a couple of times," Bernard Ward "opened" the door, "turned and walked toward the kitchen" (T.E., p. 153). Petitioner "just walked right in behind him" (T.E., p. 153).

After they both walked into the kitchen, Bernard Ward "turned around" with "a gun in his hand" (T.E., p. 154). Petitioner testified that he "grabbed [Ward's] gun hand" and with his free hand struck Ward very hard (T.E., p. 154). When Ward "tried to crawl to get the gun," petitioner "kicked him several times" (T.E., pp. 154-155, 159). Then petitioner took Ward's gun which had fallen in front of the table and "walked out" of the house (T.E., pp. 156, 159). Petitioner told the jury that he took the gun "[b]ecause [Ward] had threatened to kill Alice and [petitioner]" (T.E., P. 157).

As petitioner explained, he only went to the Ward residence "to get the gun" and he struck Ward because Ward "pointed that gun at [him]" (T.E., pp. 157-158, 159).

Daniel Thompson, petitioner's brother-in-law, testified for the defense that on November 1, 1979, Bernard Ward called him and threatened to shoot petitioner (T.E., p. 164). When petitioner picked up the extension, Ward again threatened to shoot petitioner (T.E., p. 164).

Another defense witness, William House, who was married to Bernard Ward's step-daughter, testified that he knew petitioner and Alice Ward were lovers (T.E., p. 169). On cross-examination William House explained that he "knew about the threats" made by Bernard Ward against petitioner and by petitioner against Ward (T.E., p. 180).

Mary House, another defense witness, testified that Bernard Ward had for a considerable period of time carried a gun with him (T.E., p. 182). She explained that on the night in question petitioner and Bernard Ward "were both threatening each other"(T.E., p. 184). According to Ms. House, whenever Bernard Ward is "drinking," he "gets violent" (T.E., p. 183).

On direct appeal to the Supreme Court of Kentucky, petitioner's conviction was affirmed (App., pp. 1-6). As to petitioner's complaint that he was denied his federal constitutional right to a fair trial by the prosecutor's repeated violations of the trial judge's pretrial suppression order, the Kentucky Supreme Court acknowledged that, although the "evidence seized during the search [incident to petitioner's arrest] was suppressed," at trial "the prosecutor made every effort to violate and subvert the suppression order" to the extent that "[t]he suppressed evidence was admitted in its entirety" (App., p. 4). Nevertheless, the Kentucky Supreme Court avoided reaching the merits of the assigned error by ruling that the "suppression was improper from its inception" because "the trial [judge] improperly applied Payton [v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)] retroactively to invalidate the seizure of the items incident to the arrest" (App., pp. 4-5).

The Kentucky Supreme Court reasoned that "[b]ecause the arrest was valid when made, the evidence seized should not have been suppressed" (App., p. 5).

The Kentucky Supreme Court also addressed the defense contention that federal constitutional error occurred when the prosecution was allowed to reveal to the jury that petitioner's alleged prior conviction was for substantially the same offense as the aggravated assault charge for which he was then being prosecuted. Noting that the defense "had offered to stipulate the prior offense in order to not reveal its nature to the jury," the Kentucky Supreme Court concluded that "[w]hether or not to accept a stipulation is within the

sound discretion of the trial court" (App., p. 5). Since "the trial court sua sponte admonished the jury not to consider the conviction for any purpose other than determining whether [petitioner] was a convicted felon," the Kentucky Supreme Court found "no abuse of discretion" (App., p. 5).

In a timely petition for rehearing, petitioner challenged the Kentucky Supreme Court's holding that Payton v. New York, supra, was not to be applied retroactively. However, the petition for rehearing was summarily denied.

Despite the federal constitutional nature of the assigned error, the Kentucky Supreme Court in its opinion in the case at bar treated this issue as one involving only state evidentiary law and made no mention of the federal constitutional ramifications of the alleged error (App., p. 5).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW HOLDING THAT THE PROSECUTOR'S IMPROPER TRIAL CONDUCT, WHICH ADMITTEDLY VIOLATED AND SUBVERTED THE TRIAL COURT'S ORDER SUPPRESSING EVIDENCE ON FEDERAL CONSTITUTIONAL GROUNDS, WAS NOT ERROR BECAUSE THE TRIAL COURT'S SUPPRESSION ORDER WAS ERRONEOUS, CONFLICTS WITH THE RATIONALE OF PRIOR DECISIONS OF THIS COURT AND PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

On April 17, 1980, petitioner filed a pretrial motion "to suppress all the evidence seized from his motel residence on the grounds that the warrantless search was in violation of [petitioner's] Fourth Amendment Constitutional rights" (T.E., p. 33). An evidentiary hearing on the defense motion to suppress was held on April 25, 1980 (T.S.H., p. 1). On April 29, 1980, the trial judge granted the suppression motion and ordered "any evidence received from the motel room ... suppressed" (T.R., p. 35). A .32 caliber H & R pistol revolver and a pair of shoes were seized from that motel room and were the object of the suppression order (T.S.H., pp. 15-16, 18, 27; T.E., pp. 7-9, 56-57, 90-91; T.R., p. 6).

On May 12, 1980, in a motion made prior to trial, defense counsel moved "to limit the evidence which refers to any robbery or to any possession of a handgun by a convicted felon based on the suppression hearing" (T.E., p. 7). Defense counsel emphasized that the court was "faced with a situation in this case where a crucial piece of evidence has been suppressed, the handgun" (T.E., p. 7). Pointing to the evidentiary limitations placed on the Commonwealth by the suppression order, defense counsel noted that the prosecutor "wishes to proceed on that charge [possession of a handgun by a convicted felon] where he knows in his case in chief that he cannot introduce this piece of evidence [the handgun]" (T.E., p. 7).

In response, the prosecutor argued that "the only thing the [c]ourt did in that particular [suppression] motion ... previously heard in regard to the evidence found in the motel" was to rule that "this evidence found in that motel room at that time was simply inadmissible" (T.E., pp. 8-9). The prosecutor noted that "[t]he mere fact" that the Commonwealth is "not able to show that the gun was found in the motel room, that is just one part of a chain of evidence" that is "excluded under the [c]ourt's ruling" and the prosecution "will make no reference to that" (T.E., p. 9). But he contended that "the mere fact" that the Commonwealth "can't show [the gun] over here at the end [the motel room] doesn't mean [the prosecution] can't show [the gun] at the beginning [in Bernard Ward's possession on the night in question]" (T.E., p. 9). The defense motion was later overruled (T.E., pp. 11, 12).

During his opening statement, the prosecution, told the jury:

> The gun, of course, was taken along with the $400.00. Now the evidence --- we have the gun. The Evidence Collection Department has the gun and Bernard will identify that gun that they have as being the gun he had with him. The $400.00 we don't know what happened to it.

> MR. BUGAY: Objection, and I move for a mis-trial [sic].
>
> COURT: Overruled. Sustain your objection, but overrule the motion for mistrial (T.E., p. 23; emphasis added).

Defense counsel, in his opening statement given immediately after the prosecution's opening remarks, related to the jury:

> The evidence will show that when the police came to arrest Kenny Ford, he was drunk and asleep in his hotel room, and he had the gun and will readily admit he took the gun away from Bernard Ward. But he had $27.00 on his person. He didn't have any $400.00 (T.E., p. 26).

As the prosecutor resumed his direct examination of Bernard Ward following the lunch recess, defense counsel interrupted with an objection (T.E., p. 56). Defense counsel noted that the prosecutor had "exposed ... to the jury [a gun] that [had] been suppressed earlier" by the court and was "exposing this gun to the jury" (T.E., p. 56). The defense objected and moved for a mistrial "on the grounds that this gun was never supposed to be presented to this jury," but "it has now been exposed" and "there is no way that [petitioner] can get a fair trial because this is in direct violation of [the] [c]ourt order suppressing this particular piece of evidence" (T.E., pp. 56-57).

The prosecutor responded that "[t]he Commonwealth proposes to introduce this gun for the purpose of identifying this gun purchased by Bernard Ward previous to the occasion on which he was assaulted" and "for the purpose of showing that he had this gun in his possession at the time he was assaulted, this being the gun that he had in his pocket at the time which [petitioner] asked for" it (T.E., p. 57). The prosecutor also stated that it was "not the intention of the Commonwealth to show that this gun was ever found in the possession of [petitioner] at anytime" (T.E., p. 57).

Next the prosecutor contended that defense counsel had "opened the admission of this gun to the jury for the reason that in his opening statement he admitted to the jury

that the gun was in the possession of [petitioner] in the motel room at the time he was arrested" (T.E., p. 57). According to the prosecutor, this remark "thereby waiv[ed] any question about the suppression of the gun in regard to its being used as evidence in this case" (T.E, p. 57).

The judge overruled both the defense objection and the defense motion for a mistrial (T.E., p. 57). Following that ruling, the prosecutor had Ward "look at [the] gun carefully, ... examine the serial number on it," and identify it as "the gun [he] had in [his] possession at the time [he was] assaulted" on November 3, 1979 (T.E., p. 58). The prosecutor then successfully moved to introduce the gun as Commonwealth Exhibit 2 (T.E., p. 58). Again the defense objected and moved for a mistrial, but the judge overruled his request (T.E., p. 58).

Later in the development of the Commonwealth's case-in-chief, the prosecutor initiated the following dialogue with Charles Porter, a City of Owensboro police officer:

> Q: And did you have an occasion [on November 3, 1979] to assist in the investigation of an alleged assault and battery, robbery and burglary in connection with a person by the name of Bernard Ward?
>
> A: Yes, sir.
>
> Q: Did you take into possession some items of evidence in this regard?
>
> A: Yes Sir.
>
> Q: What item of evidence is that?
>
> A: This item here is a pair of shoes.
>
> MR. BUGAY: Objection, Your Honor.
>
> COURT: Can you identify it a little further?
>
> MR. McDANIEL: Well, I am going to ask him if he's -- he says he's taken and then I am going to, yeah. I mean I was headed in that direction.
>
> COURT: All right. Well, what is the basis of the objection?
>
> (Conference at the bench out of the hearing of the Court Reporter)

MR. McDANIEL: Excuse me. Judge, I beg your pardon.

COURT: Sustain the objection (T.E., pp. 90-91).

In his timely new trial motion, petitioner asserted that "there were numerous errors made during the course of [the] trial which include but are not limited to improper admission of evidence [e.g., the suppressed handgun], improper display of evidence that had been suppressed [the suppressed shoes], [and] prejudicial statements by the Commonwealth Attorney" (T.R., p. 50, emphasis added).

The prosecutor's reference in his opening statement that the Commonwealth, more particularly, the Evidence Collection Department, "has the gun" was patently improper (T.E., p. 23).

It is well recognized that "[t]he prosecutor's opening statement should be confined to a brief statement of the issues in the case and to remarks on evidence the prosecution intends to offer which the prosecutor believes in good faith will be available and admissible." I ABA Standards, Prosecution Function (2nd Ed. 1980), Standard 3-5.5, emphasis added. "It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence." Id.

In the instant case the prosecutor could have had no "good faith and reasonable basis" to believe the handgun in question could be admitted in evidence by the Commonwealth because the trial judge in a pretrial ruling had ordered the weapon suppressed on constitutional grounds.

Yet, under these circumstances, the trial judge overruled petitioner's motion for mistrial, but sustained the defense objection (T.E., p. 23). Interestingly, although the trial judge denied the requested relief, he made no attempt to provide any lesser form of curative relief, such as an admonition (T.E., p. 23).

Faced with the prospect of the prosecution being able to admit into evidence the suppressed handgun which had been unconstitutionally seized from petitioner's motel room, trial defense counsel in his opening statement was compelled by the prosecutor's remarks and the trial court's ruling to adapt the defense case to contain petitioner's explanation of his possession of Bernard Ward's gun. This defense counsel attempted to do in his opening statement (T.E., p. 26).

Trial defense counsel obviously made a conscious tactical decision to have petitioner testify concerning his possession of the handgun when it became apparent the prosecutor would to a certain degree be permitted to place before the jury either the suppressed handgun or evidence pertaining to its seizure. Trial defense counsel's remarks in his opening statement concerning petitioner's possession of the gun and how petitioner admitted taking the weapon from Ward were clearly "impelled by the prosecutor's wrongful use of the illegally obtained" handgun and were "the fruit of the poisonous tree." Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 2010-2012, 20 L.Ed.2d 1047 (1968).

Additionally, even had the prosecutor at bar believed trial defense counsel had, by his remarks in the defense opening statement, waived any objection to the prosecution's use of the previously suppressed handgun, he was not authorized to display the still suppressed weapon to the jury or commence questioning Bernard Ward about the gun in the presence of the jury, without first obtaining a ruling from the judge that the defense had "opened the door" for the Commonwealth to present suppressed evidence in its case-in-chief.

"It is unprofessional conduct [for the prosecutor] to tender tangible evidence in the view of the ... jury if it would tend to prejudice fair consideration by the ... jury unless there is a reasonable basis for its admission in evidence." ABA Standards, Prosecution Function, supra, Standard 3-5.6(d). "When there is any substantial doubt

about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained." Id.; emphasis added.

If the prosecutor in good faith and with a reasonable basis believed a defense waiver of the right to object to the prosecution's use of suppressed evidence had occurred, this question should have been presented to the trial judge in chambers and a ruling obtained prior to any display of the handgun to the jury.

The prosecutor's theories concerning both the scope of the suppression order and the possibility of waiver of that order by the defense are not supported by either federal or state law. "Under the Fourth Amendment exclusionary rule, if a search or seizure in violation of the Amendment has occurred, then upon timely objection by a defendant with standing to object the fruits of the illegality must be suppressed and consequently may not be introduced into evidence in the criminal trial of that defendant." 3 LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1980), § 11.6, p. 699; emphasis added. "The government may not accomplish by indirection what it may not do directly, and thus if certain physical evidence is suppressed, this means that the prosecution may not introduce that evidence itself and also that the prosecution may not put in testimony regarding that physical evidence." Id.

Even Kentucky case law refutes the prosecutor's theory that, although the gun was suppressed, he could introduce the weapon itself into evidence as long as he did not inform the jury from whom the Evidence Collection Department obtained the weapon. Trevathon v. Commonwealth, Ky., 384 S.W.2d 500 (1964). Similarly, Kentucky law contradicts the prosecutor's theory of defense waiver. Trevathon v. Commonwealth, supra; Bruce v. Commonwealth, Ky., 418 S.W.2d 645, 646 (1967), citing Johnson v. Commonwealth, 217 Ky. 565, 290 S.W. 325 (1927).

In Kentucky "[a] Commonwealth's Attorney seeking an appeal of discretionary rulings within a trial court's jurisdiction has a remedy." Eaton v. Commonwealth, Ky., 562 S.W.2d 637, 639 (1978), citing KRS 22A.020(4). "[A]n interlocutory 'ruling' entered prior to trial, if it decides a matter vital to the Commonwealth's case," may "be reviewed by appeal." Eaton v. Commonwealth, supra at 639. See Commonwealth v. Bertram, Ky.App., 596 S.W.2d 379 (1980).

But the Commonwealth declined all available procedural avenues to challenge the correctness of the merits of the suppression order prior to trial, and instead resorted to the simple expedient of disregarding the judicial prohibitions contained in the suppression order.

This Court has repeatedly condemned "bad-faith conduct" by prosecutors regardless of its guise or context. See Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

In analyzing this assigned error in the case at bar, the Kentucky Supreme Court acknowledged that, although the "evidence seized during the search [incident to petitioner's arrest] was suppressed," at trial "the prosecutor made every effort to violate and subvert the suppression order" to the extent that "[t]he suppressed evidence was admitted in its entirety" (App., p. 4).

After observing that "the prosecutor's conduct raise[d] interesting questions concerning the scope of the suppression order and possible waiver by the defendant," the Kentucky Supreme Court elected not to "decide the case on those points" (App., p. 4). Instead, the Kentucky Supreme Court avoided reaching the merits of the assigned error by ruling that the "suppression was improper from its inception" because "the trial [judge] improperly applied Payton [v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)] retroactively to invalidate the seizure of the items incident to the arrest" (App., pp. 4-5).

Petitioner believes that the Kentucky Supreme Court misconceived the concept of retroactivity in search and seizure law. The constitutional decision in Payton presents no question of retroactivity because Payton did not represent a departure from this Court's long-standing approach to the Fourth Amendment. See United States v. Schleis, 582 F.2d 1166, 1173 (8th Cir. 1978). [This issue is discussed in petitioner's second reason for granting the writ, infra.]

The Kentucky Supreme Court mistakenly dealt with this issue on the basis of the law of search and seizure when in reality it is an issue of flagrant misconduct of a prosecutor which denied petitioner his federal constitutional right to a fair trial. Regardless of the correctness of the trial judge's retroactive application of the Payton principles to the arrest at bar, the prosecutor's "bad-faith conduct" in intentionally violating the suppression order was federal constitutional error.

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), citing Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). The prosecutor's introduction into evidence of the suppressed handgun and the improper display to the jury of the suppressed shoes denied petitioner his right to a fair trial.

Accordingly, petitioner requests this Court to grant certiorari to review the judgment below.

II.

THE DECISION BELOW HOLDING THAT THIS COURT'S DECISION IN PAYTON V. NEW YORK, 445 U.S. 573 (1980), IS NOT TO BE APPLIED RETROACTIVELY PRESENTS AN ISSUE VIRTUALLY IDENTICAL TO THE ISSUE BEFORE THIS COURT IN UNITED STATES V. JOHNSON, 626 F.2d 753 (9th Cir. 1980), cert. granted, ___ U.S. ___, No. 80-1608 (October 5, 1981), WHICH IS AN IMPORTANT CONSTITUTIONAL QUESTION IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

As previously explained, the Kentucky Supreme Court "determined that the suppression [in the case at bar] was

improper from its inception" (App., p. 4).

"[S]ix months before the ruling in Payton v. New York, supra, ... the police arrested [petitioner], upon probable cause, in a motel room, without a warrant" (App., pp. 4-5). According to the Kentucky Supreme Court, "[t]his type of arrest had been widely practiced and sanctioned until Payton" (App., p. 5). On this basis, the Kentucky Supreme Court concluded that "the trial [judge] improperly applied Payton retroactively to invalidate the seizure of the items incident to the arrest" (App., p. 5). "Because the arrest was valid when made," the Kentucky Supreme Court ruled that "the evidence seized should not have been suppressed" (App., p. 5).

The Kentucky Supreme Court misconceived the concept of retroactivity in search and seizure law. The constitutional decision in Payton presents no question of retroactivity because Payton did not represent a departure from this Court's long-standing approach to the Fourth Amendment. See United States v. Schleis, 582 F.2d 1166, 1173 (8th Cir. 1978).

This Court's decision in United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), expressly addressed the question of retroactivity in the context of the exclusionary rule. In Peltier, this Court considered the retroactive application of the decision in Almeida-Sanchez v. United States, 413 U.S. 266, 98 S.Ct. 2535, 3 L.Ed.2d 596 (1973), which had held warrantless border searches without probable cause to be unconstitutional and had "broadened" an existing exclusionary rule. United States v. Peltier, supra, 95 S.Ct. at 2313. This Court recognized that the search in Peltier was concededly illegal under Almeida-Sanchez, but held "that the exclusionary rule should not be mechanically applied . . .because the policies underlying the rule do not justify its retroactive application to pre-Almeida-Sanchez searches." Peltier, 95 S.Ct. at 2316. This Court reached its decision after concluding that neither of the two major purposes of the exclusionary rule -- the deterrence of unlawful police conduct and "the imperative of

judicial integrity" -- would be served by excluding evidence that "law enforcement officers reasonably believed in good faith" to be admissible even if later decisions "broadened the exclusionary rule to encompass evidence seized in that manner." Id., 95 S.Ct. at 2317. This Court held that whether the exclusionary rule should be applied in a case raising a question of retroactivity "depends on whether consideration of either judicial integrity or deterrence of Fourth Amendment violations are sufficiently weighty to require that the evidence obtained [by the illegal search] be excluded." Id., 95 S.Ct. at 2318.

Unlike Peltier, petitioner's case does not present a question of retroactivity because Payton announced no new constitutional doctrine, nor did it broaden any existing exclusionary rule.

In Payton v. New York, supra, this Court addressed "the constitutionality of New York statutes that authorize[d] police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest." Payton v. New York, supra, 100 S.Ct. 1374. The Payton decision held that "the Fourth Amendment. . .prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." Id., 100 S.Ct. at 1374-75.

This Court in Payton recognized that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, supra, 100 S.Ct. at 1380. According to this Court, "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection." Id. at 1381. "[T]his reasoning" was found "to be persuasive and in accord with [this] Court's Fourth Amendment decisions." Id.

Lastly, this Court reasoned that "neither history nor this Nation's experience required [it] to disregard overriding respect for the sanctity of the home that has been embodied in our traditions since the origins of the Republic." Id., 100 S.Ct. at 1388.

This Court in Payton rearticulated the basic meaning of the language of the Fourth Amendment:

> "The right of the people to be secure in their. . .houses. . .shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." Silverman v. United States, 865 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 784. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances that threshold may not reasonably be crossed without a warrant. Payton v. New York, supra, 100 S.Ct. at 1382.

It is well recognized that this "Court need not have applied a well-settled constitutional principle to every possible fact situation before its decisions are entitled to retroactive effect." United States v. Schleis, supra at 1174. "Moreover, in Peltier, the challenged border search had been conducted pursuant to statutory authority and similar searches had been repeatedly upheld against constitutional attack." United States v. Schleis, supra at 1174.

Kentucky, of course, had no statute specifically authorizing warrantless entry into the home to arrest even in the absence of exigent circumstances. Even appellate counsel for the Commonwealth observed in her brief below that "Kentucky courts had not decided this particular question" -- a warrantless arrest of a suspect in his home (Appellee's Brief, p. 17). Indeed, in Shanks v. Commonwealth, Ky., 463 S.W.2d 312, 315 (1971), which this Court cited in Payton, supra, 100 S.Ct. at 1386 n.46, the opinion addresses only the issue of whether the evidence obtained from the defendant's premises was obtained as a result of an illegal search. It

is impossible to ascertain from the Shanks opinion whether the defendant challenged his arrest on the theory that a warrantless arrest within his home was unconstitutional. Consequently, Shanks was not a definitive decision on this issue.

However, the law in Kentucky's federal circuit has long been settled on the question of whether a warrantless arrest of a defendant at home in the absence of exigent circumstances violates the Fourth Amendment to the United States Constitution. The United States Court of Appeals for the Sixth Circuit has repeatedly held that such warrantless arrests are unconstitutional. United States v. Shye, 492 F.2d 886 (6th Cir. 1974), United States v. Killebrew, 560 F.2d 729, 733 (6th Cir. 1977), United States v. Montano, 613 F.2d 147, 152 (6th Cir. 1980). Significantly, "of the seven United States Courts of Appeals that have considered the question, five have expressed the opinion that such arrests are unconstitutional." Payton, supra, 100 S.Ct. at 1374.

Since the arrest of petitioner and the attendant search and seizure cannot be justified under existing statute, regulations or prevailing constitutional norm, the decision in Payton presents no question of retroactivity in this case. See Metcalfe v. State, Alaska, 593 P.2d 638, 639-640 (1979), in which United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed 2d 538 (1977), was held to apply retroactively; see United States v. Tucker, 610 F.2d 1007, 1012 (2nd Cir. 1979), in which Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), was given retroactive application; see Ramsey v State, Tex., 579 S.W.2d 920, 921 (Crim.App. 1979), in which Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), was applied retroactively; and see United States v. Dien, 615 F.2d 10, 11 (2nd Cir. 1980), in which Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), was given retroactive application.

On October 5, 1981, this Court granted certiorari in United States v. Johnson, 626 F.2d 753 (9th Cir. 1980), cert. granted, ____ U.S. ____, No. 80-1608 (October 5, 1981),

to consider whether the exclusionary rule requires suppression of evidence obtained following warrantless entry of arrestee's house that occurred prior to this Court's decision in Payton and the Ninth Circuit decision in United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978).

Although the arrest in Johnson occurred on May 5, 1977, almost three years before this Court's decision in Payton, the Court of Appeals for the Ninth Circuit utilized the "strong language of Payton" to find "the warrantless arrest of Johnson, while he stood within his home," to be "a violation of the Fourth Amendment." United States v. Johnson, supra at 757.

Consequently, the issue of the retroactive application of Payton presented in this case is virtually identical to the issue presently before this Court in United States v. Johnson, supra.

Accordingly, petitioner requests this Court to grant certiorari to review the judgment below.

III

THE DECISION BELOW HOLDING THAT THE PROSECUTION MAY, DESPITE THE DEFENSE'S OFFER OF A STIPULATION, REVEAL TO THE JURY THE NATURE OF PETITIONER'S PRIOR CONVICTION WHEN PETITIONER WAS BEING TRIED FOR SUBSTANTIALLY THE SAME OFFENSE AS THE PRIOR CRIME CONFLICTS WITH THE DECISIONS OF VARIOUS FEDERAL AND STATE COURTS.

Petitioner was charged with, inter alia, possession of a handgun by a convicted felon (T.R., p. 1). Although the indictment does not indicate the nature of the prior conviction, the prosecution relied on evidence indicating that petitioner had been convicted in 1977 in an Indiana state court of the felony of aggravated assault and battery (T.E., pp. 9-10, 117-121). Because petitioner was also charged with first degree assault, the revelation to the jury of the nature of the prior felony conviction - aggravated assault and battery - prejudiced petitioner's right to a fair trial on the assault charge due to the similarities between the two offenses.

Prior to the selection of the jury, petitioner's counsel, in a motion in liminie, observed that "a further problem ... is the fact that the element of proving possession of a handgun by a convicted felon, the charge which [the prosecutor] wishes to prove in this particular case[,] is aggravated assault" (T.E., p. 8). He added it "is too prejudicial [for the prosecution] to prove that particular conviction with respect to this [count] since this man is charged with assault in the first degree" (T.E., p. 8). All of the defense's motions in liminie were eventually overruled (T.E., pp. 11, 12).

Significantly, the indictment does not indicate the nature of the prior felony conviction (T.R., p. 1). When the judge addressed the veniremen prior to the voir dire, he paraphrased the charges in the indictment, but made no mention of the nature of the prior conviction (T.E., pp. 13-14). Similarly, when the prosecutor in his opening statement alluded to a prior conviction, he did not identify the nature of that conviction (T.E., pp. 24-25).

When the prosecutor announced his intention "to introduce into evidence the certified copy of the judgment" of petitioner's alleged prior conviction, defense counsel objected "to the [manner] in which the prior conviction of Kenneth Ford is going to be introduced into evidence" (T.E., p. 117). Defense counsel noted that "because of the nature of the prior conviction, being aggravated assault, that it is highly prejudicial in that the prejudice totally outweighs the probative value of introducing documents to prove a felony conviction" (T.E., p. 117). Counsel emphasized that he had "attempted to compromise by acknowledging that there is a prior conviction without stating the nature of that conviction, but has been overruled" (T.E., p. 117). The judge implicitly overruled this objection and announced that the record of the prior conviction would "be admitted as Commonwealth Exhibit 4" (T.E., p. 117).

When the prosecutor read this exhibit to the jury, that document identified the nature of the previous conviction

as "Aggravated Assault and Battery" (T.E., p. 119). At the conclusion of the prosecution's case, the judge sua sponte admonished the jury that "this record ... will not be considered by you to any extent as truth of guilt whatsoever on the first three" counts, "only on the fourth" (T.E., pp. 121-122).

In his instruction on the offense of possession of a handgun by a felon, the judge told the jury that to convict on this charge they must find, inter alia, "[t]hat on or about the 30th day of June, 1977, in the Lake Superior Court of Lake County, Criminal Division, State of Indiana, [petitioner] was convicted of the offense of aggrevated [sic] assault and battery" (T.R., p. 43; emphasis added). This instruction emphasized the nature of the alleged prior conviction - aggravated assault and battery, an offense strikingly similar to the first degree assault offense charged in count two of the indictment.

The jury convicted petitioner of first degree assault and fixed his punishment at confinement for seventeen years (T.E., p. 220; T.R., p. 47).

In United States v. Poore, 594 F.2d 39, 40 (4th Cir. 1979), the defendant was charged with possession of a firearm after being convicted of a felony and the indictment alleged that the prior felony was "carrying a handgun." Contending that the indictment "improperly contained the nature of the prior felony conviction, i.e., 'carrying a handgun,'" the defense "was concerned that the jury, in passing on both counts of the indictment, each of which charged 'possession' of a sawed-off shotgun, could be prejudiced by being made aware of the prior handgun conviction." Id. at 40. The defense asked "for various alternative relief all to the end and effect that the jury would not be apprised of the prior handgun conviction," including a request that "the nature of the prior felony conviction" contained in the second count "be stricken from the indictment as surplusage and prejudicial." Id.

In Poore the defendant "offered to, and in fact did, stipulate that he had previously been convicted of the

felony of carrying a handgun." Id. at 40-41. Petitioner's attorney also offered to stipulate to the existence of the prior conviction without divulging the nature of that conviction, but was denied that option (T.E., p. 117). KRS 527.040(1) "does not require a specific type of prior felony conviction before the prohibitions of that [statute] attach, any felony conviction [occurring after January 1, 1975] suffices." See United States v. Poore, supra at 41. An accused's "stipulation to the prior felony conviction itself" would have "satisfied" KRS 527.040's "requirement of a prior felony conviction." Id., citing United States v. Kemper, 503 F.2d 327, 329 (6th Cir. 1974).

In Poore the judge's "refusal to strike the nature of [the defendant's] prior felony conviction from Count II of the indictment constituted an abuse of discretion." Id. at 41.

The judge at bar did sua sponte admonish the jury concerning the limited consideration they should give the prior conviction, similar admonitions were given by the judge in Poore. "Despite the [judge's] precautionary instructions," it must be "recognize[d] that 'to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime.'" United States v. Poore, supra, at 41-42, citing United States v. Foutz, 540 F.2d 733, 736 (4th Cir. 1976). Consequently, "it was not unlikely that the jury, being apprised of the fact that [the defendant] had previously been convicted of a like firearms offense, considered that fact in passing on his guilt or innocence of the offenses charged in [the] case." United States v. Poore, supra at 42. "Any such consideration, of course, would be improper." Id. "To prevent such prejudice from occurring," the trial judge "should have stricken the objectionable language." Id.

Since "[petitioner's] prior felony conviction was not admissible for any purpose other than as a proof of an element of" the possession of a firearm charge, the trial court's "refusal to strike the objectionable language ...

cannot be deemed harmless error." United States v. Poore, supra at 43.

Recently another state jurisdiction in a well reasoned opinion ruled that in a prosecution for possession of a firearm by a convicted felon "the element of a prior conviction of a felony may not be given to the jury if the defendant stipulates to it ... [u]nless the state can clearly demonstrate that its application will legitimately impair the prosecutor's case or preclude presentation of alternate theories of guilt." People v. Hall, 167 Cal.Rptr. 844, 616 P.2d 826, 833 (1980); emphasis in original.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of [this country's] criminal law." Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895), cited approvingly in Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 1935, 56 L.Ed.2d 468 (1978). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). "To implement the presumption, courts must be alert to factors that may undermine the fairness of the factfinding process." Id., 96 S.Ct. at 1693. "In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Id., 96 S.Ct. at 1693, citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The principles enunciated in Estelle are undeniably violated by an evidentiary policy which permits the prosecution to inform the jury of the nature of the prior felony conviction despite the defendant's willingness to stipulate that he had been convicted of a felony.

"Disclosure of the nature of the prior felony convictions makes it difficult to assure an accused a fair and impartial jury" and "places an unnecessary burden upon the

presumption of innocence." United States v. Blackburn, 592 F.2d 300, 301 (6th Cir. 1979) (concurring opinion). "The government cannot justify the need for routinely referring to the nature of the prior felony convictions in the indictment." Id.

When, as in the instant case, the probative value of the prosecution's evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then the use of such evidence by the state rises to the posture of the denial of fundamental fairness and due process of law. United States ex rel. Durso v. Pate, 426 F.2d 1083 (7th Cir. 1970).

Because the judge's ruling permitted the prosecution, over defense objection, to reveal to the jury the nature of the alleged prior conviction - aggravated assault and battery, when petitioner was being tried for, inter alia, first degree assault, petitioner was substantially prejudiced and denied his federal constitutional due process right to a fair trial.

Accordingly, petitioner requests this Court to grant certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

KENNETH FORD — PETITIONER

VS. NOTICE OF APPEARANCE

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * *

The Clerk will enter my appearance as counsel for petitioner. I certify that I am a member of the bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
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COUNSEL FOR PETITIONER

RECEIVED
DEC 14 1981
OFFICE OF THE CLERK
SUPREME COURT U.S.

NO. 81 5871

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

KENNETH FORD — PETITIONER

VS. — MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * *

The petitioner, Kenneth Ford, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner has been permitted by the Kentucky courts to proceed as an indigent at all stages of this action. The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

J. Vincent Aprile II

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 81-5871

KENNETH FORD,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Kenneth Ford, being first duly sworn, depose and say that I am the petitioner, in the above-entitled case; that in support of my motion to proceed on petition for writ of certiorari to the Supreme Court of Kentucky without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the action are true.

1. Are you presently employed? Yes_____ No_____

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? _____

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

_____

_____

3. Do you own any cash or checking or savings account? _____

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? _____

a. If the answer is yes, describe the property and state its approximate value.

_____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

	Name	Relationship
a.	_____	
b.	_____	
c.	_____	
d.	_____	

I understand that a false statement of answer to any questions in this affidavit will subject me to penalties for perjury.

KENNETH FORD

SUBSCRIBED AND SWORN TO before me this 12th day of December, 1991.

NOTARY PUBLIC

My Commission Expires: May 17th, 1994

Appendix

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KENNETH FORD — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

APPENDIX

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RENDERED: July 7, 1981
Not To Be Published

Supreme Court of Kentucky

80-SC-507-MR

KENNETH FORD — APPELLANT

V. — APPEAL FROM THE DAVIESS CIRCUIT COURT
HONORABLE ROBERT M. SHORT, JUDGE
Indictment No. 80-CR-013

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Kenneth Ford was convicted in the Daviess Circuit Court on one count each of first degree assault, first degree burglary, and possession of a handgun by a convicted felon. He was sentenced to 22 years imprisonment and appeals to this court as a matter of right. Seventeen errors are assigned for review. After studying the arguments made, we are of the opinion that the majority are meritless. Those meriting discussion follow in the order presented.

1. Appellant was substantially prejudiced because the jury verdict of acquittal of first degree robbery is irreconcilably inconsistent and/or inherently contradictory in fact and law with the verdicts of first degree assault and possession of a handgun by a convicted felon.

Appellant attempts to support his claim by showing that the exact same elements were required to convict on the possession and

assault charges as were required to convict on the robbery charge. If this were true, we might be compelled to delve into issues of inconsistent verdicts and double jeopardy. However, the jury was instructed that to find appellant guilty of robbery, it must find that he stole $400 and a handgun from the victim.

The possession charge required only that the jury find that appellant was in possession of a handgun. Therefore, the jury could and presumably did determine that either the intent to rob was not present or that appellant took only the gun and not the $400. No error occurred.

2. The trial court erred to appellant's substantial prejudice and denied him due process of law by failing to instruct the jury on the lesser included offense of assault under extreme emotional disturbance.

Appellant's present troubles stem from his involvement in a love triangle consisting of himself, the victim, Bernard Ward, and Bernard's wife, Alice. Bernard and Alice were separated on an intermittent basis for a number of months. During that time, appellant and Alice were cohabitating lovers. As so often happens in this type of situation, the husband felt wronged, and verbal and physical sparring between the two men escalated.

On the night of November 2, appellant and Alice were attending a party at the home of Alice's sister-in-law. During the course of the evening, both drank quite heavily. Appellant and the victim argued over the phone three different times, although it is not clear as to who called whom. Appellant testified that Bernard's threat to kill Alice filled him with determination to go to Bernard's home and take the gun away from him. Testimony establishes that once there, appellant

not only took the gun, he also severely beat the victim.

Both appellant and Bernard testified as to how the assault occurred. Their testimony does not support an instruction on extreme emotional disturbance. Bernard called appellant three times during the evening of November 2. During the second conversation, appellant told Bernard to "Bring it on, I would make him eat his _____gun." During cross examination, appellant stated that he had taken a gun away from Bernard on a prior occasion. When Bernard called a third time that night, appellant hung up. Appellant then testified, "I had a few more drinks, and the more I drank, the madder I got." This statement accurately described appellant's subsequent behavior. He was furious at being pestered by Bernard Ward. He walked to Bernard's house, and when Bernard flashed the gun, appellant hit him and knocked him down. As appellant describes it, once Bernard was on the floor and had lost the gun, appellant repeatedly kicked Bernard very hard. Such behavior is more representative of anger than uncontrollable emotions. Appellant's actions were deliberate and planned and reflected no reasonable justification or excuse under the facts as he believed them to be. Compare Ratliff v. Commonwealth, Ky., 567 S.W. 2d 307 (1978). The requested instruction had no framework within the evidence and was properly denied. Henley v. Commonwealth, Ky., _____S.W. 2d_____ (Rendered July 7, 1981); Smith v. Commonwealth, Ky., 599 S.W. 2d 900 (1980).

3. Appellant was substantially prejudiced when the prosecutor was permitted to place before the jury, either by improper display or as admitted evidence, physical evidence -- a handgun and a pair of shoes, which had been suppressed and excluded from evidence, on Fourth Amendment grounds, by a pretrial order of the court.

During a pre-trial suppression hearing the trial court, relying on a recent United States Supreme Court decision, Payton v. New York, 445 U.S. 573 (1980), ruled that the arrest of appellant was improperly executed. Therefore, the accompanying search was likewise invalidated. The evidence seized during the search was suppressed. At trial, the prosecutor made every effort to violate and subvert the suppression order. The suppressed evidence was admitted in its entirety. While the prosecutor's conduct raises interesting questions concerning the scope of a suppression order and possible waiver by the defendant, we need not decide the case on those points. Rather, we have determined that the suppression was improper from its inception.

Appellant was arrested six months before the ruling in Payton v. New York, supra. In United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L. Ed. 2d 374 (1975) the Supreme Court considered the question of the retroactive application of fourth amendment search and seizure decisions. In addressing a factual situation similar to that at hand, the court said

> /s/ince 1965 the Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect .... /I/n every case in which the Court has addressed the retroactivity problem for the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the fact finding process the Court has concluded that any such new constitutional principle would be accorded only prospective application.

The reasoning of the court is that the police, in relying on past judicial decisions, have no reason to entertain doubts as to the illegality of their conduct. Accord, United States v. Calandrella,

605 F. 2d 236 (1979).

In the instant case, the police arrested appellant, upon probable cause, in a motel room, without a warrant. This type of arrest had been widely practiced and sanctioned until Payton. Therefore, the trial improperly applied Payton retroactively to invalidate the seizure of the items incident to the arrest. Because the arrest was valid when made, the evidence seized should not have been suppressed. Michigan v. De Fillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L. Ed. 2d 343 (1979).

4. The trial court erred by allowing the prosecutor to reveal to the jury the nature of the appellant's alleged prior conviction.

In order to prove that appellant was a convicted felon in possession of a handgun, the Commonwealth read the judgment of his prior conviction. Appellant had offered to stipulate the prior offense in order to not reveal its nature to the jury. The prior conviction was for assault. Appellant claims that refusal to accept the stipulation was extremely prejudicial since he was also charged with assault in this case.

Whether or not to accept a stipulation is within the sound discretion of the trial court. The prior conviction was merely recited, not emphasized. No objection was made to its inclusion in the instructions. Most importantly, the trial court sua sponte admonished the jury not to consider the conviction for any purpose other than determining whether appellant was a convicted felon. Therefore, there was no abuse of discretion.

4. The sentencing judge abused his discretion by denying appellant's motion pursuant to KRS 532.110(1) to order that the three felony sentences fixed by the jury run concurrently.

The trial court granted appellant's motion in part and ordered that the 17 year sentence for assault and the five year sentence for possession of a handgun be served consecutively. The 10 year sentence for burglary was set to run concurrently with the other two. The issue of whether sentences shall run consecutively or concurrently is within the sound discretion of the trial court. Wilhite v. Commonwealth, Ky., 574 S.W. 2d 304 (1978). With appellant's past record before it, it was not an abuse of discretion to order that two of the sentences be served consecutively.

The judgment of the Daviess Circuit Court is affirmed.

All concur.

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Supreme Court of Kentucky

#80-SC-507-MR

KENNETH FORD — APPELLANT

V. Appeal from the Daviess Circuit Court
Honorable Robert M. Short, Judge
Indictment No. 80-CR-013

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied.

All concur.

ENTERED October 13th, 1981.

Chief Justice

Posted 10/13/81

Supreme Court of Kentucky

80-SC-507-MR

KENNETH FORD — APPELLANT

V.

APPEAL FROM DAVIESS CIRCUIT COURT
HON. ROBERT M. SHORT, JUDGE
80-CR-013

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER GRANTING ENLARGEMENT

****

On motion of the appellant an enlargement of 10 days from the date of entry of this order is granted during which the appellant may file a petition for rehearing conforming with CR 76.32(3)(d).

Stephens, Stephenson, Sternberg and Aker, JJ., sitting. All concur.

ENTERED September 16, 1981.

Chief Justice

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

KENNETH FORD — PETITIONER

VS. CERTIFICATE OF SERVICE

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * *

I, J. Vincent Aprile II, counsel for petitioner, hereby certify that the attached Petition for Writ of Certiorari, Appendix, Motion For Leave To Proceed In Forma Pauperis, Affidavit of Indigency, and Notice of Appearance were mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C., 20543, and to counsel for respondent, Hon. Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 11th day of December, 1981, by personally depositing same in a United States mail box, first-class postage prepaid.

J. Vincent Aprile II

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
MEMBER, BAR OF THE
UNITED STATES SUPREME COURT

COUNSEL FOR PETITIONER

Subscribed and sworn to before me by J. Vincent Aprile II, this 11th day of December, 1981.

Betty J. Meyer

NOTARY PUBLIC
KENTUCKY STATE AT LARGE

My commission expires: January 20, 1985

Opposition

ORIGINAL

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SUPREME COURT, U.S.

NO. 81-5871

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KENNETH FORD — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR RESPONDENT.

February 9, 1982.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER DUE PROCESS REQUIRES THAT EVIDENCE SUPPRESSED FOR ONE PURPOSE BE EXCLUDED FOR ALL PURPOSES, PARTICULARLY WHEN DEFENSE COUNSEL DISCUSSED THE EVIDENCE AND PETITIONER'S RELATIONSHIP THERETO IN HIS OPENING STATEMENT.

II. WHETHER THE DETERRENT PURPOSE OF THE EXCLUSIONARY RULE IS SERVED BY SUPPRESSING EVIDENCE OBTAINED IN GOOD FAITH RELIANCE ON CURRENT LAW.

III. WHETHER DUE PROCESS REQUIRES A PROSECUTOR TO ACCEPT DEFENSE'S OFFER TO STIPULATE A PRIOR CONVICTION IN LIEU OF PROOF THEREOF.

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OPINION BELOW

The Opinion below from the Kentucky Supreme Court is correctly set forth in Petitioner's Appendix.

JURISDICTION

Respondent accepts Petitioner's statement of the jurisdictional facts as essentially correct.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner seeks relief under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and accurately sets forth the relevant provisions.

The case also involves Kentucky Revised Statutes [hereinafter referred to as "KRS"] 431.005(1). The full text of KRS 431.005, at the time of the arrest,[1], was as follows:

> "431.005. Arrest by peace officers; by private persons.
>
> "(1) A peace officer may make an arrest in obedience to a warrant, or without a warrant when a felony or misdemeanor is committed in his presence or when he has reasonable grounds to believe that the person being arrested has committed a felony.
>
> "(2) A private person may make an arrest when a felony has been committed in fact and he has reasonable grounds to believe that the person being arrested has committed it."

COUNTERSTATEMENT OF THE CASE

In its counterstatement respondent will first present the evidence underlying the offenses charged and petitioner's

---

[1]KRS 431.005 was amended effective July 15, 1980. While the pertinent portion of the statute was not changed, the full text of the amended statute is set forth in Appendix A for the convenience of the Court.

arrest, then the facts relevant to the admission of the challenged evidence, and finally the subsequent proceedings.

Evidence Concerning Offenses Charged And Arrest

Bernard Ward, the victim in the present case, testified that he was dozing at his kitchen table around midnight on November 2, 1979, when petitioner entered Ward's house, cursed him, punched him in the face and demanded the contents of his wallet, approximately $400. (Transcript of Evidence [hereinafter referred to as "T.E."], 36, 45-48.) Ward testified petitioner then said, "Now, I want you to get that goddamn pistol out of your pocket." (T.E. 48.) As Ward raised up and put his hand in his pocket, petitioner grabbed a loose table leg and knocked Ward unconscious. (Id.) Ward next remembered crawling outside and calling a neighbor, David Wilcox, for help. (Id.)

Wilcox testified he heard noises on his front door step at approximately 12:30 a.m., November 3, 1979. (T.E. 110.) He discovered Ward lying there with blood all over his shirt. (T.E. 111.) Ward's face was bloody, black and purple, and swollen. (Id.) Wilcox called the police and sought assistance from another neighbor, Sherry Ralph. (Id.) Ms. Ralph described Ward as "beaten beyond recognition" with blood coming out of his ears, nose, mouth and all over the front and back of his shirt. (T.E. 115.) She asked Ward, "Who did that?" and Ward responded, "Kenny Ford." (T.E. 112.)

Ward spent nine days in an intensive care unit and an additional four days in the hospital as a result of his injuries, which included four broken ribs. (T.E. 49, 81-82, 112.) Police photographs introduced into evidence showed a table leg on the kitchen floor near a large pool of blood wit

additional blood splattered along a nearby wall. (Commonwealth's Exhibit 1 a-k; T.E. 99-105.)

Bernard Ward testified his difficulties with petitioner began several months earlier when his estranged wife, Alice Ward, began seeing petitioner. (T.E. 34.) Bernard lived in a separate apartment for a while but on October 22, 1979, he moved back home as he and Alice attempted reconciliation. (T.E. 32.) On November 1, 1979, Alice spent the night with petitioner at a local motel. (T.E. 37, 64, 195.) The next morning Bernard's son-in-law, William House, went to the motel to get Bernard's car keys from Alice while Bernard waited outside. (T.E. 74, 169.) Bernard and William then took the car home, cashed Bernard's Social Security Disability check for $423.10, bought some beer and liquor and returned to the house. (T.E. 13, 74-75, 169, 172, 174-175.) William House and his wife, Mary, both defense witnesses, testified they spent the evening of November 2 with Bernard eating pizza and drinking at the house but they left him there alone around 11:30 p.m. (T.E. 172, 179, 184.) Mary House testified that during the evening petitioner called Bernard several times and that they argued and threatened each other. (T.E. 184-185.)

Petitioner admitted going to Ward's house that evening to take Ward's gun away but said he felt such action was necessary to protect Alice. (T.E. 150-152.) Petitioner claimed Ward initiated the telephone conversations the evening of November 2 and threatened both Alice and him. (T.E. 149.) He stated he first thought the phone threats were "funny" since he had just been released from jail for threatening Ward. (T.E. 149-150.) During the second call, petitioner told Ward to "[b]ring it on. I would make him eat his fucking gun."

(T.E. 150-151.) Petitioner said that after the third call, "I had a few more drinks, and the more I drank the madder I got."

Petitioner then walked to Ward's house to get the gun away from him. (T.E. 152.) According to petitioner, Ward opened the front door and walked back toward the kitchen. (T.E. 153.) Petitioner stated he followed Ward but that Ward stopped at the table and turned with the gun drawn. (T.E. 153-154.) Petitioner's testimony continued:

"Q. And what did you do?

"A. I grabbed his gun hand with my left, and I hit him with a right with all I had.

"Q. And where did he go when you hit him with his [sic] right?

"A. He went down.

"Q. Did he ever get back up?

"A. No, he tried to crawl to get the gun, and I kicked him. I just got out of the hospital. I couldn't bend over to hit him again.

* * *

"Q. Okay, did you have any type of apparatus on at this time?

"A. Yeah, I had a back brace on.

"Q. How much did you kick him?

"A. Hard enough to break them ribs.

"Q. How hard did you kick him? Tell the truth.

"A. Very hard.

"Q. How many times did you kick him?

* * *

"A. I kicked him several times, Henry." (T.E. 154-155.)

Petitioner admitted leaving thereafter with the gun but denied taking any money or using the table leg to hit Ward. (T.E. 156-157.)

Police Officer Charles Porter testified he received a call around 4:30 or 4:45 a.m. and proceeded to the crime scene where William and Mary House reported that Ward's gun and $400 cash from his wallet had been taken. (T.E. 92, 95.) The beating of Bernard Ward had been investigated and reported by officers on an earlier shift. (T.E. 99-100; Transcript of Suppression Hearing [hereinafter "TSH"] 8, 20-21.)

During a pretrial suppression hearing, Officer Porter testified he was told of the beating and that Kenneth Ford was a suspect. (TSH 4-5, 14.) He interviewed the witnesses and verified that Bernard Ward was hospitalized, but was unable to interview Ward due to his critical condition. (TSH 3-4, 13-14, 20-21.) Officer Porter returned to police headquarters where he received a call that Kenneth Ford was in a room at the local Days Inn. (TSH 5.) Arriving at the motel around 6:00 a.m., he verified the registration, received no response to knocks on the door, and then entered with a key obtained from the motel clerk. (TSH 5, 11, 15.) He anticipated that petitioner may be armed and warned the clerk to "stay down." (TSH 5.) After opening the door, Officer Porter observed petitioner asleep in the room. The stolen handgun was on the floor by the bed. (Id.) The gun was removed and unloaded before awakening petitioner to place him under arrest for robbery and the beating of Bernard Ward. (TSH 6-7, 16.) When asked whether an arrest warrant was obtained, Officer Porter responded:

> "No sir; it was a felony. The subject was in critical condition. I was advised that they didn't know whether he was going to make it or not, and I went on and made the arrest." (TSH 10.)

Petitioner was indicted on four felony counts: first degree robbery, KRS 515.020; first degree burglary, KRS 511.020; first degree assault, KRS 508.010; and possession of a

handgun by a convicted felon, KRS 527.040. (Trial Record [hereinafter "T.R."] 1.)

Facts Related To Admission Of Evidence

On April 17, 1980, petitioner filed a motion to suppress evidence seized from his motel room on the grounds that a warrantless search violated his Fourth Amendment rights. (T.R. 33.) At the suppression hearing, petitioner argued lack of probable cause to arrest and that a new United States Supreme Court Opinion required police officers to obtain an arrest warrant prior to entering a person's home absent exigent circumstances. (TSH 16-18, 24.) It is apparent from the transcript that the defense was relying upon an April 16, 1980, newspaper account of the decision in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). (TSH 16-17, 24.)

After the hearing, the trial court suppressed evidence obtained from the motel room on the following grounds:

> "The Court being of the opinion that a recent and yet unpublished decision of the United States Supreme Court requires suppression in the case." (T.R. 35.)

The trial court also overruled a motion to dismiss based on lack of probable cause to arrest. (T.R. 36-37; T.E. 2-4.) On appeal, the question of probable cause was not presented to the Kentucky Supreme Court.

The morning of trial, May 12, 1980, petitioner made an oral motion in limine "to limit the evidence which refers to any robbery or to any possession of a handgun by a convicted felon based on the suppression hearing . . ." (T.E. 7.) Petitioner argued these offenses required certain crucial evidence (the handgun) which had been suppressed and that the prosecutor should be permitted to proceed only on the charges of assault and burglary. (T.E. 7-8.) In effect, defense

counsel was arguing that the charges of first degree robbery and possession of a handgun must be dismissed since the handgun had been suppressed. The Commonwealth responded that it had no intention of referring to the finding of the handgun in petitioner's motel room but that the suppression order did not preclude admission of testimony and the gun to show that the victim had the gun at the time he was assaulted and robbed and that petitioner demanded and took the gun at that time. (T.E. 8-9.)

As an additional ground for dismissing the charge of possession of a handgun by a convicted felon, petitioner's counsel argued that petitioner's prior conviction was for aggravated assault and that proof of that element of the offense would be "too prejudicial." (T.E. 8.)

Petitioner's motions were overruled and trial commenced. (T.E. 11-12.)

The prosecutor, in his opening statement, referred in part to the evidence to be produced as follows:

> ". . . The Defendant took the money out of the billfold. Then he demanded the pistol. He said--and again used profanity, he said, 'Give me that pistol.' And as Bernard stood up, that is when he struck him again. The Defendant then took a table leg that was loose off of the table. We have the table leg--we have a picture of it there on the floor of house. It was a loose table leg, and the Evidence Collection Department has the table leg. He took that table leg and struck Bernard over on his left side in the rib cage area, and that is basically the last thing that Bernard remembers. The gun, of course, was taken along with the $400.00. Now, the evidence--we have the gun. The Evidence Collection Department has the gun and Bernard will identify that gun that they have as being the gun he had with him. The $400.00 we don't know what happened to it.
>
> "MR. BUGAY: Objection, and I move for a mis-trial.
>
> "COURT: Overruled. Sustain your objection, but overrule the motion for mis-trial." (T.E. 22-23; Appendix B, 1-2.)

It is noted that the prosecutor's comments regarding the present status of the gun are no different than his comments on the table leg. It is not clear from the transcript that defense counsel's objection related to the gun; instead, it appears he objected to the prosecutor's reference to the $400.

Defense counsel commented in his opening statement as follows:

> ". . . The evidence will not show that Kenny Ford took that money from Bernard Ward, but the evidence will show a malicious intent of this individual to prove that certain circumstances. The evidence will show that when the police came to arrest Kenny Ford, he was drunk and asleep in his hotel room, and he had the gun and will readily admit he took the gun away from Bernard Ward. But he had $27.00 on his person. He didn't have any $400.00." (T.E. 26; Appendix B, 3-4.)

During direct examination of Bernard Ward, defense counsel objected and moved for mistrial when the prosecutor asked if he had purchased a gun. (T.E. 42-43; Appendix B, 5-6.) The trial judge summarily overruled. (Id.) Following a lunch recess, defense counsel objected and moved for mistrial on the ground the gun was exposed to the jury in contravention of the court's suppression order. (T.E. 56-57; Appendix B, 7-8.) The related bench conference was not transcribed; however, the court overruled the objection and motion. (Id.) After the victim identified the gun, the court overruled objections to its introduction. (T.E. 58; Appendix B, 9.)

The arresting officer on direct was asked if evidence was taken and no objection was made. (T.E. 90.) The officer then described the evidence as "a pair of shoes." (T.E. 90-91; Appendix B, 10-11.) Following an unreported bench conference, petitioner's objection was sustained and no further comment made nor relief sought. (T.E. 91.) On cross-examination, defense counsel probed and solicited testimony that petitioner

admitted at the time of arrest that he had taken the gun but denied taking any money. (T.E. 93-95; Appendix B, 12-14.)

At the conclusion of the Commonwealth's case, petitioner's motion for mistrial on the ground that the evidence violated the suppression order was overruled. (T.E. 122-124, 126.)

Petitioner took the stand and admitted taking the gun and keeping it rather than voluntarily turning it over to the police that night. (T.E. 156-157, 161; Appendix B, 15-17.) He vigorously denied taking any money from Ward. (Id.) Defense counsel repeatedly referred in his closing argument to the fact that petitioner had the gun in his possession when arrested. (T.E. 197, 198, 201, 202; Appendix B, 18-21.)

With regard to petitioner's prior conviction, the prosecutor read into evidence and introduced a certified copy of petitioner's 1977 judgment over defense objection. (T.E. 117-121.) Petitioner's objection and offer to stipulate the prior conviction were overruled. (T.E. 117.) The nature of the prior conviction was included only once in the language of the entire judgment and was not thereafter mentioned except as part of the instruction, to which petitioner made no objection. (T.R. 43; T.E. 194.) Following introduction of the prior judgment, the trial court, sua sponte, admonished the jury as follows:

> "COURT: Ladies and gentlemen, as I told you at the beginning of this trial, there are four charges against the Defendant and this record that you have heard--had read to you will not be considered by you to any extent as truth of guilt whatsoever on the first three. The fourth--the fourth count of the indictment is on the 3rd day of November of '79, the Defendant committed the offense of possession of a handgun after having been previously convicted of a felony. It is only to that charge that this is any proof whatsoever or for which you may give it any weight. You will not consider

it insofar as it relates to the first three counts, only the fourth." (T.E. 121-122.)

Subsequent Proceedings

At the conclusion of trial, the jury's findings were as follows:

(a) First degree robbery - not guilty.

(b) First degree assault - guilty, sentence fixed at seventeen years.

(c) First degree burglary - guilty, sentence fixed at ten years.

(d) Possession of a handgun by a convicted felon - guilty, sentence fixed at five years. (T.E. 220; T.R. 47.)

In its final judgment the trial court fixed the seventeen and five-year sentences to run consecutively, with the ten-year sentence to run concurrent thereto, for a total of twenty-two years. (T.R. 56.)

On direct appeal to the Kentucky Supreme Court petitioner raised seventeen issues, many of which were not preserved for appellate review and/or were meritless and thus were not addressed in the Court's Memorandum Opinion (Petitioner's Appendix [hereinafter "Slip Opinion"], 1-6.)

With regard to petitioner's claim that he was substantially prejudiced and denied his right to a fair trial by admission of the suppressed handgun and the Commonwealth's response that the evidence was not suppressed for all purposes and that defense tactics waived any objection, the Kentucky Supreme Court expressly decined to decide the question:

> "While the prosecutor's conduct raises interesting questions concerning the scope of a suppression order and possible waiver by the defendant, we need not decide the case on those points. Rather, we have determined that the suppression was improper from its inception." (Slip Opinion, p. 4; emphasis added.)

Relying on United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), Michigan v. De Fillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), and related authority, the Kentucky Supreme Court held that the trial court "improperly applied Payton [v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)] retroactively" to the present case. (Slip Opinion, pp. 4-5.) Noting that "this type of arrest had been widely practiced and sanctioned until Payton," the Court concluded: "Because the arrest was valid when made, the evidence seized should not have been suppressed." (Id.)

Petitioner's third question, whether he was substantially prejudiced and denied due process by admission of the nature of his prior conviction, was resolved by the Kentucky Supreme Court as follows:

> "Whether or not to accept a stipulation is within the sound discretion of the trial court. The prior conviction was merely recited, not emphasized. No objection was made to its inclusion in the instructions. Most importantly, the trial court sua sponte admonished the jury not to consider the conviction for any purpose other than determining whether appellant was a convicted felon. Therefore, there was no abuse of discretion." (Id.)

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION IN THAT THE KENTUCKY SUPREME COURT DECLINED TO DECIDE WHETHER THE PROSECUTOR'S CONDUCT CONSTITUTED ERROR IN LIGHT OF THE SCOPE OF THE SUPPRESSION ORDER AND PETITIONER'S CONDUCT "OPENING THE DOOR" TO THE ADMISSION OF SUPPRESSED EVIDENCE.

Rule 21(h) of the Rules of this Court) provides in part:

> "If review of the judgment of a state court is sought, the statement of the case

> shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." (Emphasis added.)

Petitioner acknowledges on page 10 of his Petition that, on the question of whether petitioner was denied his right to a fair trial by the prosecutor's conduct in admitting the handgun for a limited purpose, "the Kentucky Supreme Court avoided reaching the merits of the assigned error by ruling that the 'suppression was improper from its inception' . . ." However, in presenting the question to this Court, petitioner states: "The decision below holding that the prosecutor's improper trial conduct . . . was not error . . . was erroneous." (Petition, p. 11.) The record refutes any such holding. In its Opinion the Kentucky Supreme Court stated:

> "While the prosecutor's conduct raises interesting questions concerning the scope of the suppression order and possible waiver by the defendant, we need not decide the case on those points. Rather, we have determined that the suppression was improper from its inception." Slip Opinion, p. 4.

It is the longstanding policy and practice of the Kentucky Supreme Court to refuse to render advisory opinions or to answer moot questions. See: Green v. Ball, 216 Ky. 563, 288 S.W. 309 (1926); Hudspeth v. Commonwealth, 204 Ky. 606, 265 S.W. 18 (1924); Dillingham v. Commonwealth, Ky., 249 S.W.2d 827 (1952).

Likewise, it has long been established that this Court lacks jurisdiction under 28 U.S.C. §1257(3) unless a federal question was raised and decided in the state court below. Crowell v. Randell, 10 Pet. 368, 391; Cardinale v. Louisiana, 394 U.S. 437, 438. The record demonstrates that there has been no final decision by the state's highest court on the federal question presented herein; thus, petitioner's invocation of this Court's jurisdiction is premature.

Should this Court decide that the Kentucky Supreme Court erred in its determination that "the suppression was improper from its inception," then the matter should be remanded to the Kentucky Supreme Court for consideration of the question not previously decided.

Moreover, the Commonwealth respectfully submits that the prosecutor committed no error. The error alleged by petitioner is that the prosecutor "violated and subverted the trial court's order suppressing evidence." (Petition, p. 11.) To the contrary, the record reveals that the prosecutor fully advised the court prior to trial that he wished to admit the handgun in a limited manner. (T.E. 8-9.) The court ruled in the prosecutor's favor. (T.E. 11-12.) The prosecutor then fulfilled his commitment by making only limited reference to the handgun. Each time petitioner's counsel raised the question of contravention of the suppression order, the trial judge ruled, in effect, that the order was not being violated. (T.E. 42-43, 56-57, 58, 122-124, 126; Appendix B.)

Additionally, petitioner's trial counsel "opened the door" to full admission of the evidence and waived any constitutional claim when he announced in his opening statement:

> "The evidence will show that when the police came to arrest Kenny Ford, he was drunk and asleep in his hotel room, and he had the gun and will readily admit he took the gun away from Bernard Ward." (T.E. 26.)

Subsequently, petitioner intentionally elicited testimony that petitioner admitted from the outset that he took the gun and kept it. (T.E. 93-95, 156-157; Appendix B.) Defense counsel emphasized in his closing argument that petitioner had the gun in his possession when arrested in the motel room. (T.E. 197-198, 201-202.)

Appellate counsel argues that these admissions were "impelled" by the prosecutor's conduct. A review of the facts strongly suggests instead a carefully planned defense tactic to admit taking and keeping the handgun and committing the assault, while relying on the defense of protection of others, all with the hope that the jury would treat petitioner leniently on the other offenses charged. A part of this strategy was a vigorous denial that petitioner took $400 from Bernard Ward. (T.E. 23, 26, 93-95, 156-157, 197-198.) An inference as to the success of this strategy arises from the jury's disposition of the other charges: first degree robbery--acquitted, first degree burglary--minimum sentence.

Defense tactics such as these which open the door to the admission of evidence are recognized as exceptions to the general prohibition against admission of suppressed evidence. See: LaFave, Search and Seizure, §11.6(b), p. 711; see also: United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980).

Inasmuch as the Kentucky Supreme Court has never decided this question, either in petitioner's favor or against him, this Court's jurisdiction is not properly invoked and the petition should be denied.

II.

THE KENTUCKY SUPREME COURT CORRECTLY DECIDED, CONSISTENTLY WITH DECISIONS OF THIS COURT, THAT WARRANTLESS ARRESTS IN A RESIDENCE WERE PREVIOUSLY AUTHORIZED IN KENTUCKY AND THAT THE EXCLUSIONARY RULE SHOULD NOT HAVE BEEN APPLIED TO AN ARREST THAT WAS VALID WHEN MADE.

Petitioner argues the Kentucky Supreme Court improperly decided that Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), was not to be retroactively applied to the present case. In support, petitioner claims that this Court's decision in Payton did not depart from the long-standing approach to the Fourth Amendment and, thus, presents no question as to retroactive application. The Commonwealth of Kentucky respectfully disagrees.

In Payton this Court expressly recognized the numerous state statutes and decisions which would be overturned by the new holding.

> "A majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries . . ." Id., 445 U.S. at 598.

Kentucky's warrantless arrest statute, KRS 431.005, was not listed among those authorizing warrantless entries; however, the validity of such entries in Kentucky was expressly recognized as follows:

> "One State has authorized warrantless arrest entries by judicial decision. See Shanks v. Commonwealth, 463 S.W.2d 312, 315 (Ky.App. 1971)." Id. at n. 46.

Kentucky's then highest court recited the facts in Shanks, supra, in the following manner:

> "After Silvestro had made the above two purchases from appellant, he solicited the services of several other officers and together they went to appellant's apartment. They knocked on the door. Appellant came to the door, which contained a large glass panel at the top. Sgt. Frank Fryman told

> appellant that he was under arrest for the illegal sale of narcotic drugs and ordered him to open the door. Appellant refused to open the door and the officers made their entry by force. Upon entering the room, appellant was placed under arrest. In the course of the arrest one of the officers noticed four small yellow capsules on a night table near the spot where appellant stood. These were taken by the officers and, upon analysis, were found to contain phenobarbital." Id. at 313.

Petitioner attempts to diminish the effect of Shanks by claiming the opinion addresses only whether there was an illegal search; yet the language of the case specifically speaks to the legality of the arrest.

> "Appellant in his brief adopts the facts as testified to by himself and argues from these facts that the arrest was illegal. It is elementary that the court was not bound to accept these facts. If the facts as testified to by the officers are accepted, then the arrest was perfectly legal and the capsules properly admitted in evidence. There is no question but what Silvestro had probable cause to believe Shanks had committed a felony. The law is universal where an officer has reasonable grounds to believe a felony has been committed, he may break into a house in order to effect the arrest of one accused of a felony. 5 Am.Jur.2d, Arrests, § 89, p. 775. . . ." Id. at 315.

Subsequently in Roberts v. Commonwealth, Ky., 572 S.W.2d 598 (1978), a warrantless arrest in a home was challenged on the ground there was no probable cause to believe Roberts had committed a felony. The Kentucky Supreme Court upheld the warrantless arrest as based on probable cause and stated:

> "From time immemorial the law in this jurisdiction provides that if an officer has reasonable grounds to believe that a felony has been committed he can make an arrest without a warrant." Id. at 600.

In addition to the foregoing decisions of the Kentucky courts, Kentucky's arrest statute, KRS 431.005, provides support for the position that in Kentucky, prior to Payton, supra, a warrantless entry into a home to arrest was legal even

in the absence of exigent circumstances. In November, 1979, the time of the arrest in the present case, KRS 431.005(1) provided:[2]

> "A peace officer may make an arrest in obedience to a warrant, or without a warrant when a felony or misdemeanor is committed in his presence or when he has reasonable grounds to believe that the person being arrested has committed a felony." (Emphasis added.)

The language of the statute is virtually identical to that used by the Kentucky court. This language authorizes peace officers to make arrests anywhere, including a home. The absence of any explicit exception for the home in KRS 431.005 or any amendment to the statute in light of Shanks v. Commonwealth, supra, is persuasive evidence that warrantless arrests were authorized in the home as well as elsewhere.

In Kentucky, as well as in numerous other jurisdictions, Payton v. New York, supra, represented a new constitutional rule which significantly broadened the existing exclusionary rule. The arrest in the present case occurred November 3, 1979, nearly six months before the decision in Payton. Thus, the question of retroactivity was squarely presented to the Kentucky Supreme Court.

When faced with a similar decision in United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), this Court explained at the outset:

> "Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases '[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises

---

[2] See note 1, supra, and Appendix A. KRS 431.005 was enacted in 1962 and amended effective July 15, 1980. The pertinent language of the statute was not changed by the amendment.

> serious questions about the accuracy of guilty verdicts in past trials,' Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971), the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application. [Citations omitted.]" Id. at 535.

After reviewing decisions on retroactivity, this Court concluded, with regard to the policy of maintaining judicial integrity, that:

> "The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. It would seem to follow a fortiori from the Linkletter [Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601] and Fuller [Fuller v. Alaska, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212] holdings that the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution. . . ." Id. at 537-538.

As regards the policy of deterring police misconduct, a similar conclusion was reached:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. . . ." Id. at 542.

More recently, in Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), this Court determined that a warrantless arrest made in good faith reliance on an ordinance, which was subsequently declared unconstitutional, was valid when made and evidence discovered in the search incident thereto did not have to be suppressed.

In the instant case, the arrest was made in a motel room at 6:00 a.m., November 3, 1979, and within a few (six) hours after the crime occurred. The entry was a peaceable one. No question is presented as to the existence of probable cause to believe petitioner had committed one or more felonies and that he was present in the motel room. There were reasonable grounds to believe the suspect was armed. The peace officer's testimony demonstrates his good faith belief that his conduct was in accordance with the law at the time the arrest was made. He knew he had reasonable grounds to believe petitioner had committed a felony, that he was present in the motel room, and that the law at that time authorized him to enter petitioner's residence without a warrant to effect the arrest. The purposes of the exclusionary rule would not be furthered by its application to facts such as these. The Kentucky Supreme Court correctly held that Payton was not to be retroactively applied under the circumstances.

Several courts recently have considered the same issue presented to the Kentucky Supreme Court and, likewise, concluded that Payton is not to be given retroactive application: Clements v. State, Ala.Cr.App., 390 So.2d 1131 (1980); State v. Friddle, La., 396 So.2d 1242 (1981); State v. Smith, Minn., 305 N.W.2d 798 (1981); Hotley v. State, Nev., 630 P.2d 1225 (1981); People v. Graham, App.Div., 431 N.Y.S.2d 209 (1980); State v. Nagel, N.D., 308 N.W.2d 539 (1981);

Commonwealth v. Miller, Pa., 417 A.2d 128 (1980); State v. Counts, Wash.App., 620 P.2d 1013 (1981). But see: Busch v. State, Fla.App., 392 So.2d 272 (1981); United States v. Johnson, 626 F.2d 753 (9th Cir. 1980), cert. granted, ___ U.S. ___, No. 80-1608 (October 5, 1981).

The Kentucky Supreme Court decision is in accord with, not in conflict with, the decisions of other state courts of last resort and applicable decisions of this Court. Petitioner has failed to show the requisite special and important reasons for granting review on writ of certiorari. Accordingly, the petition should be denied.

Alternatively, should this Court decide that Payton v. New York, supra, is to be applied retroactively, the Kentucky Supreme Court should be given an opportunity to consider whether the warrantless arrest was justified under the exigent circumstances existing at the time. See: La Fave, Search and Seizure, §6.1(c).

III.

DUE PROCESS DOES NOT REQUIRE A PROSECUTOR TO ACCEPT A STIPULATION, IN LIEU OF PROOF, OF A PRIOR CONVICTION FOR THE OFFENSE OF POSSESSION OF A HANDGUN BY A CONVICTED FELON.

Respondent submits that no substantial federal question is presented herein by petitioner. He points to no specific constitutional right which has been infringed; instead, he argues that under the penumbra of due process his right to a fair trial was infringed by permitting introduction of a judgment as proof of his prior conviction, which judgment, in the course of its several pages, included a reference to the nature of his prior conviction. Petitioner argues that any revelation of the nature of his prior conviction, assault, was substantially prejudicial in that he was currently charged with

the offense of assault in addition to the charge for possession of a handgun by a convicted felon. Petitioner further argues that the trial court was obliged, under the due process concept of fundamental fairness, to accept his offer to stipulate the nature of the prior conviction.

Petitioner's authorities do not support the far-reaching proposition he asserts. United States v. Poore, 594 F.2d 39 (4th Cir. 1979), on which he heavily relies, simply holds that a district court abused its discretion under Federal Rule of Criminal Procedure 7(d) by refusing to strike from an indictment unnecessary language descriptive of the prior conviction. Id. at 41. Due process is nowhere mentioned in the opinion. Abuse of discretion is not synonymous with violation of due process.

In petitioner's case, no similar unnecessary descriptive language appeared in the indictment. Instead, the trial court simply ruled to admit into the record proof, in the form of a certified judgment, rather than a stipulation offered by defense counsel. As stated in the recent case of Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981):

> "This court knows of no rule or principle of law that requires the Commonwealth's Attorney to try his case by stipulation. . . ." Id. at 877.

The nature of the prior conviction was not emphasized and the trial court promptly admonished the jury concerning the limited purpose for which the prior conviction was introduced.

Petitioner's case is most closely analogous to that of United States v. Blackburn, 592 F.2d 300 (6th Cir. 1979), in which the court stated:

> "In his appeal Blackburn asserts that it was error for the trial court to have refused his offer to stipulate that he had committed the felonies described in the indictment in order to avoid disclosing their nature to the jury. In short, the appellant asks this court to reconsider its

earlier opinion in United States v. Burkhart, 545 F.2d 14 (6th Cir. 1976). Upon consideration, the court adheres to its decision in Burkhart, supra, particularly under the facts of this case." Id. at 301.

See also: United States v. Smith, 520 F.2d 544, 548 (8th Cir. 1975).

Even if there were any error by the trial court, it was rendered harmless beyond a reasonable doubt by the strong admonition delivered by the court and by petitioner's own testimony that, with regard to the present assault of Bernard Ward, petitioner:

> ". . .hit him [Ward] with a right with all I had.
>
> * * *
>
> ". . .he tried to crawl to get the gun and I kicked him.
>
> * * *
>
> "Q. How much did you kick him?
>
> "A. Hard enough to break them ribs.
>
> "Q. How hard did you kick him? Tell the truth.
>
> "A. Very hard.
>
> "Q. How may times did you kick him?
>
> * * *
>
> "A. I kicked him several times . . ." (T.E. 154-155.)

There being no special and important reasons for granting review, the petition must be denied.

CONCLUSION

Because the Kentucky Supreme Court has never decided the first question presented by petitioner, this Court lacks jurisdiction to review. As to the remaining questions, the decision of the Kentucky Supreme Court does not conflict with decisions of this Court but instead is in full accord with the

principles announced and with the decisions reached by state and federal courts under similar circumstances.

Respectfully submitted,

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NO. 81-5871

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KENNETH FORD — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

CERTIFICATE OF SERVICE

I, George M. Geoghegan, Jr., one of the counsel for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of February, 1982, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by placing a copy of same in the United States mail, first-class postage prepaid, and addressed to the Honorable J. Vincent Aprile, II, Assistant Deputy Public Advocate, Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, Counsel for Petitioner.

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October Term, 1981

KENNETH FORD — PETITIONER

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

RESPONDENT'S APPENDIX A

431.005. Arrest by peace officers—By private persons.—(1) A peace officer may make an arrest:

(a) In obedience to a warrant; or

(b) Without a warrant when a felony is committed in his presence; or

(c) Without a warrant when he has reasonable grounds to believe that the person being arrested has committed a felony; or

(d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or

(e) Without a warrant when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his presence.

(2) Any peace officer may arrest without warrant when he has reasonable grounds to believe that if the person is not arrested he will present a danger or threat of danger to others if not immediately restrained and in addition he has probable cause for believing that said person has intentionally or wantonly caused physical injury to his spouse, parent, grandparent, child, or stepchild. Within twelve (12) hours following apprehension and booking of a person arrested under this section, an officer shall return to the abused person, if the abused person is an adult, and request that a signed, written statement be made by the abused person stating that an abuse occurred and the person who committed it. If the abused person refuses to sign the statement, the charges shall be summarily dismissed and the defendant released from custody.

(3) For purposes of subsection (2) of this section a "peace officer" is a full-time sworn officer of the Kentucky state police, a full-time city policeman, a full-time county policeman, a full-time city-county policeman, a duly elected sheriff, or a full-time paid deputy sheriff.

(4) A private person may make an arrest when a felony has been committed in fact and he has reasonable grounds to believe that the person being arrested has committed it. (Enact. Acts 1962, ch. 234, § 31; 1980, ch. 369, § 1; 1980, ch. 312, § 1, effective July 15, 1980.)

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RESPONDENT'S APPENDIX B

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Along--around 11:00 and I may have that time not quite accurate, but Bernard had been drinking. He had fallen asleep at the kitchen table. And when he woke up--something woke him up, and there the Defendant stood. He had the gun in his belt or in his pocket rather, Bernard did. And he also had the $400--the approximate $400.00 in his billfold. The Defendant sat down at the table and very shortly thereafter started hitting Bernard in the face, just beating him as Bernard would tell you like that. And then he, of course, he used some foul language and Bernard will tell you what that language was. He demanded his money. Bernard got his billfold out and sat it on the table. Now, the pictures we will bring to you that the officers--Evidence Collection Officer, John Kazlauskas, took soon after this event occurred will show the wallet sitting on the table there, more or less in the same position that Bernard put it in when the Defendant demanded his money. The Defendant took the money out of the billfold. Then he demanded the pistol. He said--and again used profanity. He said, "Give me that pistol." And as Bernard stood up, that is when he struck him again. The Defendant then took a table leg that was loose off of the table. We have the table leg--we have a picture of it there on the floor of the house. It was a loose table leg, and the Evidence Collection Department has the table leg. He took

that table leg and struck Bernard over on his left side in the rib cage area, and that is basically the last thing that Bernard remembers. The gun, of course, was taken along with the $400.00. Now, the evidence--we have the gun. The Evidence Collection Department has the gun and Bernard will identify that gun that they have as being the gun he had with him. The $400.00 we don't know what happened to it.

MR. MURRAY: Objection, and I move for a mis-trial.

COURT: Overruled. Sustain your objection, but overrule the motion for mis-trial.

MR. McDANIEL: The Defendant--I don't mean the Defendant, but the victim, Mr. Ward, was then taken to the Owensboro Daviess County Hospital and the primary treating physician was Doctor Lowry. There were a number of other attending physicians, but they immediately put him in Intensive Care. He went in on 11/3/1979. He was in Intensive Care for a number of days, and he was released from the hospital on 11/16/1979. And Doctor Lowry will explain to you what problems he had as far as these injuries that the Defendant had inflicted upon him. Doctor Lowry will tell you that if he had not been admitted to the hospital when he was, in all likelihood he would have died from the injuries he received. Bernard has emphysema

called Kenny Ford and his wife. They were at a party together, and they were drunk. He called him repeatedly and told him that he was going to kill Alice, that he was going to kill Kenny, that when she got home she was going to get it. And Kenny Ford went over to that home to take that gun away from Bernard Ward, and that was his sole expressed purpose was to take that gun away from Bernard Ward. The evidence will show that no burglary took place. In fact, Kenny Ford used to live there in that house with Alice Ward, and, in fact, the evidence will show that at the time that this man was in that house, he was under a restraining order and was not suppose to be in that house issued by this Judge right here. The evidence will further show that Kenny Ford was welcome enough in that home before and in the past as he was on that night by the mere fact that he owned a key--he possessed a key to that home. He slept in that home. He built a patio to that home. He knew everything about that home. The evidence will not show that Kenny Ford took that money from Bernard Ward, but the evidence will show a malicious intent of this individual prove that certain circumstance. The evidence will show that when the police came to arrest Kenny Ford, he was drunk and asleep in his hotel room, and he had the gun and will readily admit he took the gun away from Bernard Ward. But he had $27.00 on his person. He didn't have any $400.00.

And the evidence will not show anywhere where he could have disposed of that money. And the evidence will show to you that a gun is very traceable, but crack is not. The evidence will show, and Kenny Ford is going to tell you, the man that sits here accused, he's going to tell you that he beat this man and he beat him good and he meant to beat him up. And we won't pull and punches here. The evidence is going to show that. What degree of assault it shows, I don't know, for the evidence will not show anything about that table leg. What it will show is that if you touch the table those legs would fall out, and during the affray those legs fell down and that is why they were on the ground There will not be any fingerprints of Kenny Ford on those table legs nor will there be any hair or flesh samples or any indication whatsoever to prove scientifically that he used that particular instrument upon Bernard Ward because the evidence will show that Kenny is a lot bigger and he didn't need it. He simply doesn't need it. The evidence will show a very bad case by the Commonwealth and for that reason it will show that Kenny Ford has been far over-charged. Thank you.

COURT: Ladies and gentlemen, I think we had better recess for a moment. We have been here for about an hour now. Let's be back at twenty minutes after 11. Remember that you are not to discuss the case at anytime

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"Hello, Bob Evans." He walked back toward me, and Alice got between us.

Q. What then did you do?

A. I got my knife out of my pocket.

Q. Did you--what did you do with that knife, if anything?

A. Nothing at all. Because--

Q. Did you open the knife--the blade?

A. No, I did not.

Q. How long did that incident last there--the confrontation you had with him?

A. About five minutes or something like that.

Q. Who left the office first?

A. Richard Flaherty and Mr. Ford.

Q. Did you then talk to Mr. Flaherty?

A. Yes, I did.

Q. You in the presence of your wife?

A. Yes, I did.

Q. Now, prior to November the

3rd, 1979, did you purchase a .32 caliber H & R pistol revolver?

MR. BOCAR: Objection, referring to evidence which will not be introduced. I move for a mistrial

COURT: Well, overruled.

A. I got the pistol. I have got the check return right here. I bought it the same day--

Q. What day did you purchase this pistol, Bernard?

A. I purchased it on--wait just a minute right here and I will tell you. October the 22nd, 1979.

Q. Okay, and did you have that pistol in your possession thereafter up until November the 3rd, 1979?

A. Yes, I did.

Q. Did you have it in your possession on the night or the early morning hours of November the 3rd, when this incident occurred?

A. Yes, I did.

Q. Where did you have that pistol in your possession at this time?

A. In my left front pocket.

Q. Now, immediately--let's think about the time that this incident occurred. How long had

I believe that is all.

COURT: All right, before we commence cross-examination, let's recess for lunch. Is that all right, Mr. Bugay?

MR. BUGAY: Yes.

COURT: At 1:00 o'clock, ladies and gentlemen. Remember not to talk about the case and don't permit anyone to talk to you about it. We will see you at 1:00.

(AFTER THE LUNCH RECESS, THE TRIAL RESUMED IN OPEN COURT.)

Upon further questioning by Hon. James McDaniel, the witness testified as follows:

Q. Bernard--

MR. BUGAY: Objection.

(Conference at the bench out of the hearing of the Court Reporter)

(WHICH DICTATED TO REPORTER OUT OF THE HEARING OF THE JURY)

MR. BUGAY: Mr. McDaniel has exposed a gun to the jury that has been suppressed on April the 29th, by this Court, and he is now exposing this gun to the jury, and I am objecting and move for a mistrial on the grounds that this gun was never suppose to be presented to this jury, and it has now been exposed, and the defense

counsel respectfully contends that there is no way that Mr. Kenneth Ford can get a fair trial because this is in direct violation of a Court order suppressing this particular piece of evidence.

MR. McDANIEL: The Commonwealth proposes to introduce this gun for the purpose of identifying this gun as being the gun purchased by Bernard Ward previous to the occasion on which he was assaulted, and for the purpose of showing that he had this gun in his possession at the time he was assaulted, this being the gun that he had in his pocket at that time which the Defendant asked for. It is not the intention of the Commonwealth to show that this gun was ever found in the possession of the Defendant at anytime. Further the Defendant's attorney opened the admission of this gun to the jury for the reason that in his opening statement he admitted to the jury that the gun was in the possession of the Defendant in the motel room at the time he was arrested thereby waiving any question about the suppression of the gun in regard to its being used as evidence in this case.

COURT: Overrule the objection and overrule the motion for a mistrial.

. . . . . .

Q. Bernard, I want you to look at this gun carefully--I have examined it, and it is

unloaded, but I don't want you to point it to anybody. I want you to look at it, examine the serial number on it, and tell the ladies and gentlemen of the jury whether or not this is the gun you had in your possession at the time you were assaulted on November the 3rd, 1979?

A. Yes, it is the same gun.

MR. McDANIEL: Okay, that is all I have to ask him. I'd like to like to introduce this as part of the Commonwealth's evidence in this case and have it appropriately marked.

COURT: Let the Court Reporter mark it as Commonwealth's Exhibit 2.

(said gun was introduced and entered into evidence and marked as Commonwealth's Exhibit 2)

MR. BUGAY: Defense respectfully objects, and would move for a mistrial.

COURT: Overruled. Now, cross-examination, Mr. Bugay.

Upon cross examination by Hon. Henry Bugay, the witness testified as follows:

XQ Now, Bernard how long--now, Bernard, isn't it a fact that you have known Kenny for approximately 9 months prior to this incident, isn't that correct?

A. No, I didn't know Kenny

COURT: Next witness, please.

CHARLES PORTER

The witness, having been first duly sworn by the Court and upon examination by Hon. James McDaniel, testified as follows:

Q. Would you state your name and occupation to the jury, please?

A. Charles Porter, Police Officer, City of Owensboro.

Q. Officer Porter, how long have you been a Police Officer with the City?

A. This time five years.

Q. Officer Porter, were you on duty on November the 3rd of 1979?

A. Yes, sir.

Q. And did you have an occasion to assist in the investigation of an alleged assault and battery, robbery and burglary in connection with a person by the name of Bernard Ward?

A. Yes, sir.

Q. Did you take into possession some item of evidence in this regard?

A. Yes, sir.

Q. What item of evidence is that

A. This item here is a pair of

shows.

MR. MURRAY: Objection, Your Honor.

COURT: Can you identify it a little further?

MR. McDANIEL: Well, I am going to ask him if he's--he says he's taken and then I am going to, yeah. I mean I was headed in that direction.

COURT: All right. Well, what is the basis of the objection?

MR. MURRAY: May we approach the bench.

(Conference at the bench out of the hearing of the Court Reporter)

MR. McDANIEL: Excuse me. Judge, I beg your pardon.

COURT: Sustain the objection.

Q. The--did you--as part of your investigation, did you interview some people?

A. Yes, sir.

Q. Did you attempt to interview the victim, Bernard Ward?

A. No, sir; he was in critical condition at the Owensboro Daviess County Hospital.

Q. And did you make an investigat at the scene of where the incident occurred? Did you go there?

Kenny Ford, how much cash did he have in his possession?

A. I don't recall how much. It was a very small amount, but I don't recall the exact amou

XQ Could it have been $27.00?

A. It could have, yes.

XQ Did Kenny know why that you had come to arrest him at his hotel?

A. He asked me why and I told him. I had to wake him up, and he asked me what I wanted and I told him he was under arrest. And he asked me what for, and I told him. I told him that Bernard was in very critical condition, that he may not live, and that he was under arrest for robbery in the first degree.

XQ And did he think that that-- that you were referring to money, if you know?

A. I ask him where the $400.00 was at, and he said he didn't know. He said that he didn't know what I was talking about. Of course, we advised him of his rights and everything.

XQ But he freely told you that he didn't know anything about $400.00, is that correct?

A. Yes, sir.

XQ Did he make any other statements about anything else?

A. Just the gun.

XQ Did he freely admit that he'd taken the gun away from Bernard Ward?

A. He said he had taken the gun there. I told him the gun was stolen, and he said that he'd taken it.

XQ And so he freely admitted that he took the gun, but he didn't tell you that he knew anything at all about any of the money, is that correct?

A. That is correct.

XQ Now, did you go to the scene of the alleged crime?

A. Yes, sir.

XQ And did you observe a wallet anywhere at that particular time?

A. Yes, sir.

XQ Where did you observe a wallet?

A. It was laying on the table.

XQ And did you take that wallet into evidence?

A. I don't recall whether I did or not. The son-in-law had the wallet--had picked up the wallet.

XQ Who is that?

A. A gentlemen by the name of Mo

I don't have his full name with me right now, but his last name was House. He was a son-in-law and also Mr. Ford's daughter was there.

XQ Did they handle that wallet before you ever saw it?

A. I am sure they did. In fact, they picked it up while I was there.

XQ And they are the ones who told you that there was money missing, is that correct?

A. Yes, sir; they also reported the gun missing.

XQ Kenny Ford readily admitted that he had taken the gun away from this alleged victim here, is that correct?

A. He said he took the gun. He didn't say whether he took it away from the victim or what, but he took the gun.

XQ And he didn't know anything at all about any money, is that correct?

A. That is what he said.

MR. BUCAY: No further questions.

Upon re-direct examination by Hon. James McDaniel, the witness testified as follows:

Q. What did they tell you about the money?

that table leg on him?

A. No, if I'd of jerked that table leg off, bottles and everything would have been broke.

Q. Did you ever see his wallet?

A. Yeah, I seen it.

Q. When was the first time you ever saw his wallet?

A. When you brought them damn pictures up to show me at the jail.

Q. And where was the wallet when you saw it first?

A. In them pictures.

Q. Did you take his $400.00?

A. No, I did not.

Q. How much money did you have with you when you were arrested?

A. $27.00, and some change.

Q. Now, you have heard testimony about the gun that you knocked out of his hand here. Did you take the gun away him?

A. Yes, I stuck it down in my brace and walked out.

Q. Why did you take that gun out

of that home?

A. Because he had threatened to kill Alice and kill me. He didn't need a gun. Well, I didn't either.

Q. Is that the first gun that you've ever taken away from him?

A. No, it's not.

Q. Okay, did you know that he got a social security check on November the 2nd?

A. I don't know what kind of mail that man gets.

Q. Did you take that man's money

A. No, I did not.

Q. Is there any doubt in your mind?

A. No, I know I didn't take it.

Q. But you took the gun?

A. I took the gun.

Q. Okay, did you have the intention of doing anything but taking the gun away from this man when you went to his home?

A. No, that is all I went for was just to get that gun.

Q. Why did you beat him?

A. Because he pointed that gun

there testify about the condition of his face. How did his face get in that condition, do you know?

A. I would imagine that I done it.

XQ Well, if you only hit him one time, then you must have kicked him in the face?

A. That is a possibility.

XQ Why did you take--why did you take that gun all the way to the Motel? Why didn't you just throw it away?

A. I was going to give it to Alice, but she was pretty well drunked up, and I figured I would give it to her the next day.

XQ Why didn't you take it down to Police Headquarters, and turn it over to them and tell them what had occurred?

A. Because I was going to the Motel to sleep off a drunk. I wasn't going to any place else.

XQ Well, you didn't have any problem getting from the Burden's residence over to the Ward's residence did you? You got there all right?

A. Yeah, I walked.

XQ And did you walk from there over to the Motel?

carefully to the things that Kenny Ford told you because Kenny told the good and the bad. He didn't pull any punches. He told it the way it was because he's the one out here that they are trying to send away forever. And what are they doing that based upon--Bernard Ward. "Bernard, do you carry a gun with you often?" "Oh, no. I hardly ever carry one." Not one witness up here told you that that was the truth. Not one. "Bernard, do you ever hide your money?" "No, I never do it." Every single one of the witnesses who knows him best told you he always hides his money when he gets drunk. When he was in the hospital, did he say anything about his money being stolen from him. No. It was the Houses' who first brought it up. He mentioned something of his gun. He never said anything of his money. "Kenny, when was the first time you saw that wallet?" And his language isn't too good, and I apologize for that. Kenny didn't go to college. Kenny didn't finish high school. Kenny is probably not a whole lot like you and me. He lives in a tough world. He lives in a world where we don't live in. "Kenny, when was the first time you saw that wallet?" "The first time I saw that wallet--that damn wallet, Mr. Bugay, is when you showed it to me in the picture." When the police came to arrest Kenny, and this is the best evidence that goes toward that robbery, when the police came and arrested Kenny at the hotel where he always stays, they found

the gun that he took away, and he said, "Oh, I guess you are here because I took the gun away from Bernard." And they said, "No, we are here about the money." And he said, "I don't know anything about any money." And he had $27.00 on him. Now, let me ask you this. If you were going to steal from someone that you had known for 9 months, would you go to the hotel where you normally stayed. The evidence showed that he and Alice used to stay in that hotel. And the police knew right where to go to get him. He made no bones about where he was going to stay. Would you go there. Would you get rid of the gun that could so easily be traceable, and not the money, which is just--money is just money. You can't trace money. You can't tell one dollar bill from the next, but a gun you can. Kenny Ford is not a thief. He's not a burglar. He's stayed in that house on many occasions. He built a patio on the back. He fixed the table himself. He had a key to the front door, and there is no evidence whatsoever in this record today that doesn't state that he didn't knock on that door. And he says he knocked hard. And he knocked twice, and that coincides with the evidence that the prosecution shows, because here is a drunk man. He knocks hard; he wakes him up; he staggers to the front door. It takes him a while, and he opens up the door. Kenny follows him back to the kitchen, and laying on the table is a .32, which Bernard pulls around and points at Kenny.

particular time. A home where Alice Ward had lawful and legal possession of, and he was restrained from that home but he was there. Why wasn't Alice home with him. She didn't want him there anymore. She loved Kenny Ford. That's why Alice wasn't at home with Bernard Ward, so Bernard brings all his liquor home and makes himself right at home. I'm back now. Everything is okay, and I can start causing trouble again and I can get him. You know, the Commonwealth attorney made a big deal about why Kenny Ford didn't call the police. "Well, why didn't you just call the police?" And Kenny in his truthfulness, and I mean this, said "Well, the police ain't never done nothing for me." And they haven't. You heard the evidence that he'd been arrested before, and he plead guilty there. He didn't contest the charge. He simply plead guilty and took his lumps. But he comes here today, and he says to you twelve people, he says, "I am innocent. I am not guilty. I am here to say I don't want to go to prison for 65 years. If you give me the minimum, I will only go for 30 years. I don't want to be punished anymore than I have. I don't want to be punished anymore than I have." Well, Kenny is charged with possession of a handgun, and I have got trouble with that charge because Kenny came up here and told you he took the gun away and he went back to the hotel room and then they came and arrested him. He had the gun.

And that charge bothers me because it carries a one to five year sentence. And I am very frightened by the fact that technically he could be in violation of that Statute and be sent to the penitentiary. But this wasn't the first time Kenny ever had to take a gun from this man, and I hope somebody takes a gun from him forever. I think he's a dangerous man. I think everybody that took this stand during the last two days told you, "This is a dangerous man." Ask yourself in respect to that charge, did Kenny mean to keep that gun or was his possession just fleeting for the purpose of protection of Alice and her daughter so that they could go home--to their own home. Kenny said on the stand, and Alice did too, "I can't understand why a man like Bernard Ward can have these guns and I can't." Well, he knew he wasn't suppose to have possession, but he did it for love, for Alice Ward. Well, you may say, "Is Alice Ward worth all this." And I am going to give you all a secret. She is probably not. She is not worth this man being beaten up even though it was done to protect him, and I dare say that the self-protection clause that the Judge has given you in these Instructions fits absolutely perfectly under the facts as we are given them. And you have no real other facts except this man's word against this man's word, and is that guilt beyond a reasonable doubt. I dare say not. Let me read it to you. Self protecti

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